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IN THE

Supreme Court of the United States

JOHN SALVADOR, JR. and KATHLEEN A. SALVADOR,

Petitioners,

v.

ADIRONDACK PARK AGENCY OF THE STATE OF NEW YORK,

THE LAKE GEORGE PARK COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX - VOLUME II

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10 TRANSPORTATION FACILITIES

10.1 General. Every station, bus stop, bus stop pad, terminal, building or other transportation facility, shall comply with the applicable provisions of 4.1 through 4.35, sections 5 through 9, and the applicable provisions of this section. The exceptions for elevators in 4.1.3(5) exception 1 and 4.1.6(1)(k) do not apply to a terminal, depot, or other station used for specified public transportation, or an airport passenger terminal, or facilities subject to Title II.

10.3 Fixed Facilities and Stations.

10.3.1 New Construction. New stations in rapid rail, light rail, commuter rail, intercity bus, intercity rail, high speed rail, and other fixed guideway systems (e.g., automated guideway transit, monorails, etc.) shall comply with the following provisions, as applicable.

(1) Elements such as ramps, elevators or other circulation devices, fare vending or other ticketing areas, and fare collection areas shall be placed to minimize the distance which wheelchair users and other persons who cannot negotiate steps may have to travel compared to the general public. The circulation path, including an accessible entrance and an accessible route, for persons with disabilities shall, to the maximum extent practicable, coincide with the circulation path for the general public. Where the circulation path is different, signage complying with 4.30.1, 4.30.2, 4.30.3, 4.30.5, and 4.30.7(1) shall be provided to indicate direction to and identify the accessible entrance and accessible route.

(2) In lieu of compliance with 4.1.3(8), at least one entrance to each station shall comply with 4.14, Entrances. If different entrances to a station serve different transportation fixed routes or groups of fixed routes, at least one entrance serving each group or route shall comply with 4.14, Entrances. All accessible entrance shall, to the maximum extent practicable, coincide with those used by the majority of the general public.

(3) Direct connections to commercial, retail, or residential facilities shall have an accessible route complying with 4.3 from the point of connection to boarding platforms and all transportation system elements used by the public. Any elements provided to facilitate future direct connections shall be on an accessible route connecting boarding platforms and all transportation system elements used by the public.

(4) Where signs are provided at entrances to stations identifying the station or the entrance, or both, at least one sign at each entrance shall comply with 4.30.4 and 4.30.6. Such signs shall be placed in uniform locations at entrances within the transit system to the maximum extent practicable.

(8) Platform edges bordering a drop-off and not protected by platform screens or guard rails shall have a detectable warning. Such detectable warnings shall comply with 4.29.2 and shall be 24 inches wide running the full length of the platform drop-off.

(9) In stations covered by this section, rail-to-platform height in new stations shall be coordinated with the floor height of new vehicles so that the vertical difference, measured when the vehicle is at rest, is within plus or minus

5/8 inch under normal passenger load conditions. For rapid rail, light rail, commuter rail, high speed rail, and intercity rail systems in new stations, the horizontal gap, measured when the new vehicle is at rest, shall be no greater than 3 in. For slow moving automated guideway "people mover" transit systems, the horizontal gap in new stations shall be no greater than 1 in.

EXCEPTION 1: Existing vehicles operating in new stations may have a vertical difference with respect to the new platform within plus or minus 1-1/2 in.

(10) Stations shall not be designed or constructed so as to require persons with disabilities to board or alight from a vehicle at a location other than one used by the general public.

(5) New direct connections to commercial, retail, or residential facilities shall, to the maximum extent feasible, have an accessible route complying with 4.3 from the point of connection to boarding platforms and all transportation system elements used by the public. Any elements provided to facilitate future direct connections shall be on an accessible route connecting boarding platforms and all transportation system elements used by the public.

10.3.3 Existing Facilities: Alterations.

(1) For the purpose of complying with 4.1.6(2) Alterations to an Area Containing a Primary Function, an area of primary function shall be as defined by applicable provisions of 49 C.F.R. 37.43(c) (Department of Transportation's ADA Rule) or 28 C.F.R. 36.403 (Department of Justice's ADA Rule).

10.5 Boat and Ferry Docks.

APPENDIX

This appendix contains materials of an advisory nature and provides additional information that should help the reader to understand the minimum requirements of the guidelines or to design buildings or facilities for greater accessibility. The paragraph numbers correspond to the sections or paragraphs of the guideline to which the material relates and are therefore not consecutive (for example, A4.2.1 contains additional information relevant to 4.2.1). Sections of the guidelines for which additional material appears in this appendix have been indicated by an asterisk. Nothing in this appendix shall in any way obviate any obligation to comply with the requirements of the guidelines itself.

A2.2 Equivalent Facilitation. Specific examples of equivalent facilitation are found in the following sections:

4.1.6(3)(c) Elevators in Alterations

4.31.9 Text Telephones

7.2 Sales and Service Counters, Teller Windows, Information Counters

9.1.4 Classes of Sleeping Accommodations

9.2.2(6)(d) Requirements for Accessible Units, Sleeping Rooms, and Suites

A4.1.1 Application.

A4.1.1(3) Areas Used Only by Employees as Work Areas.

Where there are a series of individual work stations of the same type (e.g., laboratories, service counters, ticket booths), 5%, but not less than one, of each type of work station should be constructed so that an individual with disabilities can maneuver within the work stations. Rooms housing individual offices in a typical office building must meet the requirements of the guidelines concerning doors, accessible routes, etc. but do not need to allow for maneuvering space around individual desks. Modifications required to permit maneuvering within the work area may be accomplished as a reasonable accommodation to individual employees with disabilities under Title I of the ADA.

Consideration should also be given to placing shelves in employee work areas at a convenient height for accessibility or installing commercially available shelving that is adjustable so that reasonable accommodations can be made in the future.

If work stations are made accessible they should comply with the applicable provisions of 4.2 through 4.35.

A4.1.2 Accessible Sites and Exterior Facilities: New Construction.

A4.1.3 Accessible Buildings: New Construction.

A4.1.3(5) Only full passenger elevators are covered by the accessibility provisions of 4.10. Materials and equipment hoists, freight elevators not intended for passenger use, dumbwaiters, and construction elevators are not covered by these guidelines. If a building is exempt from the elevator

requirement, it is not necessary to provide a platform lift or other means of vertical access in lieu of an elevator.

Under Exception 4, platform lifts are allowed where existing conditions make it impractical to install a ramp or elevator. Such conditions generally occur where it is essential to provide access to small raised or lowered areas where space may not be available for a ramp. Examples include, but are not limited to, raised pharmacy platforms, commercial offices raised above a sales floor, or radio and news booths.

A4.1.6 Accessible Buildings: Alterations.

A4.1.6(1)(h) When an entrance is being altered, it is preferable that those entrances being altered be made accessible to the extent feasible.

A4.2 Space Allowances and Reach Ranges.

A4.2.1 Wheelchair Passage Width.

(1) Space Requirements for Wheelchairs. Many persons who use wheelchairs need a 30 in (760 mm) clear opening width for doorways, gates, and the like, when the latter are entered head-on. If the person is unfamiliar with a building, if competing traffic is heavy, if sudden or frequent movements are needed, or if the wheelchair must be turned at an opening, then greater clear widths are needed. For most situations, the addition of an inch of leeway on either side is sufficient. Thus, a minimum clear width of 32 in (815 mm) will provide adequate clearance. However, when an opening

or a restriction in a passageway is more than 24 in (610 mm) long, it is essentially a passageway and must be at least 36 in (915 mm) wide.

(2) Space Requirements for Use of Walking Aids. Although people who use walking aids can maneuver through clear width openings of 32 in (815 mm), they need 36 in (915 mm) wide passageways and walks for comfortable gaits. Crutch tips, often extending down at a wide angle, are a hazard in narrow passageways where they might not be seen by other pedestrians. Thus, the 36 in (915 mm) width provides a safety allowance both for the person with a disability and for others.

(3) Space Requirements for Passing. Able-bodied persons in winter clothing, walking straight ahead with arms swinging, need 32 in (815 mm) of width, which includes 2 in (50 mm) on either side for sway, and another 1 in (25 mm) tolerance on either side for clearing nearby objects or other pedestrians. Almost all wheelchair users and those who use walking aids can also manage within this 32 in (815 mm) width for short distances. Thus, two streams of traffic can pass in 64 in (1625 mm) in a comfortable flow. Sixty inches (1525 mm) provides a minimum width for a somewhat more restricted flow. If the clear width is less than 60 in (1525 mm), two wheelchair users will not be able to pass but will have to seek a wider place for passing. Forty-eight inches (1220 mm) is the minimum width needed for an ambulatory person to pass a nonambulatory or semi-ambulatory person. Within this 48 in (1220 mm) width, the ambulatory person will have to twist to pass a wheelchair user, a person with a service animal, or a semi-ambulatory person. There will be little leeway for swaying or missteps. . . .

A4.2.3 Wheelchair Turning Space.
These guidelines specify a minimum space of 60 in (1525 mm) diameter or a 60 in by 60 in (1525 mm by 1525 mm) T-shaped space for a pivoting 180-degree turn of a wheelchair. This space is usually satisfactory for turning around, but many people will not be able to turn without repeated tries and bumping into surrounding objects. The space shown in . . . will allow most wheelchair users to complete U-turns without difficulty.

A4.2.4 Clear Floor or Ground Space for Wheelchairs.
The wheelchair and user shown in . . .represent typical dimensions for a large adult male. The space requirements in this guideline are based upon maneuvering clearances that will accommodate most wheelchairs. Fig. A3 provides a uniform reference for design not covered by this guideline.

A4.2.5 & A4.2.6 Reach. Reach ranges for persons seated in wheelchairs may be further clarified by . . . . These drawings approximate in the plan view the information shown . . . .

A4.3 Accessible Route.

A4.3.1 General.

(1) Travel Distances. Many people with mobility impairments can move at only very slow speeds; for many, traveling 200 ft (61 m) could take about 2 minutes. This assumes a rate of about 1.5 ft/s (455 mm/s) on level ground. It also assumes that the traveler would move continuously. However, on trips over 100 ft (30 m), disabled people are apt to rest frequently, which substantially increases their trip times. Resting periods of 2 minutes for every 100 ft (30 m)

can be used to estimate travel times for people with severely limited stamina. In inclement weather, slow progress and resting can greatly increase a disabled person's exposure to the elements.

(2) Sites. Level, indirect routes or those with running slopes lower than 1:20 can sometimes provide more convenience than direct routes with maximum allowable slopes or with ramps.

A4.3.11.3 Stairway Width. A 48 in (1220 mm) wide exit stairway is needed to allow assisted evacuation (e.g., carrying a person in a wheelchair) without encroaching on the exit path for ambulatory persons.

A4.4 Protruding Objects.

A4.4.1 General. Service animals are trained to recognize and avoid hazards. However, most people with severe impairments of vision use the long cane as an aid to mobility. The two principal cane techniques are the touch technique, where the cane arcs from side to side and touches points outside both shoulders; and the diagonal technique, where the cane is held in a stationary position diagonally across the body with the cane tip touching or just above the ground at a point outside one shoulder and the handle or grip extending to a point outside the other shoulder. The touch technique is used primarily in uncontrolled areas, while the diagonal technique is used primarily in certain limited, controlled, and familiar environments. Cane users are often trained to use both techniques.

Potential hazardous objects are noticed only if they fall within the detection range of canes . . . . Visually impaired people walking toward an object can detect an overhang if its lowest surface is not higher than 27 in (685 mm). When walking alongside protruding objects, they cannot detect overhangs. Since proper cane and service animal techniques keep people away from the edge of a path or from walls, a slight overhang of no more than 4 in (100 mm) is not hazardous.

A4.5 Ground and Floor Surfaces.

A4.5.1 General. People who have difficulty walking or maintaining balance or who use crutches, canes, or walkers, and those with restricted gaits are particularly sensitive to slipping and tripping hazards. For such people, a stable and regular surface is necessary for safe walking, particularly on stairs. Wheelchairs can be propelled most easily on surfaces that are hard, stable, and regular. Soft loose surfaces such as shag carpet, loose sand or gravel, wet clay, and irregular surfaces such as cobblestones can significantly impede wheelchair movement.

Slip resistance is based on the frictional force necessary to keep a shoe heel or crutch tip from slipping on a walking surface under conditions likely to be found on the surface. While the dynamic coefficient of friction during walking varies in a complex and non-uniform way, the static coefficient of friction, which can be measured in several ways, provides a close approximation of the slip resistance of a surface. Contrary to popular belief, some slippage is

necessary to walking, especially for persons with restricted gaits; a truly "non-slip" surface could not be negotiated.

The Occupational Safety and Health Administration recommends that walking surfaces have a static coefficient of friction of 0.5. A research project sponsored by the Architectural and

Transportation Barriers Compliance Board (Access Board) conducted tests with persons with disabilities and concluded that a higher coefficient of friction was needed by such persons. A static coefficient of friction of 0.6 is recommended for accessible routes and 0.8 for ramps.

It is recognized that the coefficient of friction varies considerably due to the presence of contaminants, water, floor finishes, and other factors not under the control of the designer or builder and not subject to design and construction guidelines and that compliance would be difficult to measure on the building site. Nevertheless, many common building materials suitable for flooring are now labeled with information on the static coefficient of friction. While it may not be possible to compare one product directly with another, or to guarantee a constant measure, builders and designers are encouraged to specify materials with appropriate values. As more products include information on slip resistance, improved uniformity in measurement and specification is likely. The Access Board's advisory guidelines on Slip Resistant Surfaces provides additional information on this subject.

Cross slopes on walks and ground or floor surfaces can cause considerable difficulty in propelling a wheelchair in a

straight line.

A4.6 Parking and Passenger Loading Zones.

A4.8 Ramps.

A4.8.1 General. Ramps are essential for wheelchair users if elevators or lifts are not available to connect different levels. However, some people who use walking aids have difficulty with ramps and prefer stairs.

A4.8.2 Slope and Rise. Ramp slopes between 1:16 and 1:20 are preferred. The ability to manage an incline is related to both its slope and its length. Wheelchair users with disabilities affecting their arms or with low stamina have serious difficulty using inclines. Most ambulatory people and most people who use wheelchairs can manage a slope of 1:16. Many people cannot manage a slope of 1:12 for 30 ft (9 m).

A4.8.4 Landings. Level landings are essential toward maintaining an aggregate slope that complies with these guidelines. A ramp landing that is not level causes individuals using wheelchairs to tip backward or bottom out when the ramp is approached.

A4.8.5 Handrails. The requirements for stair and ramp handrails in this guideline are for adults. When children are principal users in a building or facility, a second set of handrails at an appropriate height can assist them and aid in preventing accidents.

A4.9 Stairs.

A4.9.1 Minimum Number. Only interior and exterior stairs connecting levels that are not connected by an elevator, ramp, or other accessible means of vertical access have to comply with 4.9.

A4.11 Platform Lifts (Wheelchair Lifts).

A4.11.2 Other Requirements. Inclined stairway chairlifts, and inclined and vertical platform lifts (wheelchair lifts) are available for short-distance, vertical transportation of people with disabilities. Care should be taken in selecting lifts as some lifts are not equally suitable for use by both wheelchair users and semi-ambulatory individuals.

A4.29 Detectable Warnings.

A4.29.2 Detectable Warnings on Walking Surfaces. The material used to provide contrast should contrast by at least 70%.

Contrast in percent is determined by:

Contrast = [(B1 - B2)/B1] x 100

where B1 = light reflectance value (LRV) of the lighter area and B2 = light reflectance value (LRV) of the darker area.

Note that in any application both white and black are never absolute; thus, B1 never equals 100 and B2 is always greater

than 0.

A4.30 Signage.

Pt. 36, App. B
Appendix B to Part 36 -- Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities (Published July 26, 1991)

Subpart A -- General

Section 36.101 Purpose

Section 36.101 states the purpose of the rule, which is to effectuate title III of the Americans with Disabilities Act of 1990. This title prohibits discrimination on the basis of disability by public accommodations, requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part, and requires that examinations or courses related to licensing or certification for professional or trade purposes be accessible to persons with disabilities.

Section 36.102 Application

Section 36.102 specifies the range of entities and facilities that have obligations under the final rule. The rule applies to any public accommodation or commercial facility as those terms are defined in Sec.36.104. It also applies, in

accordance with section 309 of the ADA, to private entities that offer examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes. Except as provided in Sec.36.206, "Retaliation or coercion," this part does not apply to individuals other than public accommodations or to public entities. Coverage of private individuals and public entities is discussed in the preamble to Sec.36.206.

As defined in Sec.36.104, a public accommodation is a private entity that owns, leases or leases to, or operates a place of public accommodation. Section 36.102(b)(2) emphasizes that the general and specific public accommodations requirements of subparts B and C obligate a public accommodation only with respect to the operations of a place of public accommodation. This distinction is drawn in recognition of the fact that a private entity that meets the regulatory definition of public accommodation could also own, lease or lease to, or operate facilities that are not places of public accommodation. The rule would exceed the reach of the ADA if it were to apply the public accommodations requirements of subparts B and C to the operations of a private entity that do not involve a place of public accommodation. Similarly, Sec.36.102(b)(3) provides that the new construction and alterations requirements of subpart D obligate a public accommodation only with respect to facilities used as, or designed or constructed for use as, places of public accommodation or commercial facilities.

On the other hand, as mandated by the ADA and reflected in Sec.36.102(c), the new construction and alterations requirements of subpart D apply to a commercial facility

whether or not the facility is a place of public accommodation, or is owned, leased, leased to, or operated by a public accommodation.

Section 36.102(e) states that the rule does not apply to any private club, religious entity, or public entity. Each of these terms is defined in Sec.36.104. The exclusion of private clubs and religious entities is derived from section 307 of the ADA; and the exclusion of public entities is based on the statutory definition of public accommodation in section 301(7) of the ADA, which excludes entities other than private entities from coverage under title III of the ADA.

Section 36.103 Relationship to Other Laws

Section 36.103 is derived from sections 501 (a) and (b) of the ADA. Paragraph (a) provides that, except as otherwise specifically provided by this part, the ADA is not intended to apply lesser standards than are required under title V of the Rehabilitation Act of 1973, as amended (29 U.S.C. 790 - 794), or the regulations implementing that title. The standards of title V of the Rehabilitation Act apply for purposes of the ADA to the extent that the ADA has not explicitly adopted a different standard from title V. Where the ADA explicitly provides a different standard from section 504, the ADA standard applies to the ADA, but not to section 504. For example, section 504 requires that all federally assisted programs and activities be readily accessible to and usable by individuals with handicaps, even if major structural alterations are necessary to make a program accessible. Title III of the ADA, in contrast, only requires alterations to existing facilities if the modifications are "readily achievable," that is, able to be accomplished easily and

without much difficulty or expense. A public accommodation that is covered under both section 504 and the ADA is still required to meet the "program accessibility" standard in order to comply with section 504, but would not be in violation of the ADA unless it failed to make "readily achievable" modifications. On the other hand, an entity covered by the ADA is required to make "readily achievable" modifications, even if the program can be made accessible without any architectural modifications. Thus, an entity covered by both section 504 and title III of the ADA must meet both the "program accessibility" requirement and the "readily achievable" requirement.

Paragraph (b) makes explicit that the rule does not affect the obligation of recipients of Federal financial assistance to comply with the requirements imposed under section 504 of the Rehabilitation Act of 1973.

Paragraph (c) makes clear that Congress did not intend to displace any of the rights or remedies provided by other Federal laws or other State or local laws (including State common law) that provide greater or equal protection to individuals with disabilities. A plaintiff may choose to pursue claims under a State law that does not confer greater substantive rights, or even confers fewer substantive rights, if the alleged violation is protected under the alternative law and the remedies are greater. For example, assume that a person with a physical disability seeks damages under a State law that allows compensatory and punitive damages for discrimination on the basis of physical disability, but does not allow them on the basis of mental disability. In that situation, the State law would provide narrower coverage, by excluding mental disabilities, but broader remedies, and

an individual covered by both laws could choose to bring an action under both laws. Moreover, State tort claims confer greater remedies and are not preempted by the ADA. A plaintiff may join a State tort claim to a case brought under the ADA. In such a case, the plaintiff must, of course, prove all the elements of the State tort claim in order to prevail under that cause of action.

A commenter had concerns about privacy requirements for banking transactions using telephone relay services. Title IV of the Act provides adequate protections for ensuring the confidentiality of communications using the relay services. This issue is more appropriately addressed by the Federal Communications Commission in its regulation implementing title IV of the Act.

Section 36.104 Definitions

"Act." The word "Act" is used in the regulation to refer to the Americans with Disabilities Act of 1990, Pub. L. 101 - 336, which is also referred to as the "ADA."

"Commerce." The definition of "commerce" is identical to the statutory definition provided in section 301(l) of the ADA. It means travel, trade, traffic, commerce, transportation, or communication among the several States, between any foreign country or any territory or possession and any State, or between points in the same State but through another State or foreign country. Commerce is defined in the same manner as in title II of the Civil Rights Act of 1964, which prohibits racial discrimination in public accommodations.

The term "commerce" is used in the definition of "place of public accommodation." According to that definition, one of the criteria that an entity must meet before it can be considered a place of public accommodation is that its operations affect commerce. The term "commerce" is similarly used in the definition of "commercial facility."

The use of the phrase "operations affect commerce" applies the full scope of coverage of the Commerce Clause of the Constitution in enforcing the ADA. The Constitution gives Congress broad authority to regulate interstate commerce, including the activities of local business enterprises (e.g., a physician's office, a neighborhood restaurant, a laundromat, or a bakery) that affect interstate commerce through the purchase or sale of products manufactured in other States, or by providing services to individuals from other States. Because of the integrated nature of the national economy, the ADA and this final rule will have extremely broad application.

"Commercial facilities" are those facilities that are intended for nonresidential use by a private entity and whose operations affect commerce. As explained under Sec.36.401, "New construction," the new construction and alteration requirements of subpart D of the rule apply to all commercial facilities, whether or not they are places of public accommodation. Those commercial facilities that are not places of public accommodation are not subject to the requirements of subparts B and C (e.g., those requirements concerning auxiliary aids and general nondiscrimination provisions).

Congress recognized that the employees within commercial facilities would generally be protected under title I (employment) of the Act. However, as the House Committee on Education and Labor pointed out, "[t]o the extent that new facilities are built in a manner that make[s] them accessible to all individuals, including potential employees, there will be less of a need for individual employers to engage in reasonable accommodations for particular employees." H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 117 (1990) [hereinafter "Education and Labor report"]. While employers of fewer than 15 employees are not covered by title I's employment discrimination provisions, there is no such limitation with respect to new construction covered under title III. Congress chose not to so limit the new construction provisions because of its desire for a uniform requirement of accessibility in new construction, because accessibility can be accomplished easily in the design and construction stage, and because future expansion of a business or sale or lease of the property to a larger employer or to a business that is a place of public accommodation is always a possibility.

The term "commercial facilities" is not intended to be defined by dictionary or common industry definitions. Included in this category are factories, warehouses, office buildings, and other buildings in which employment may occur. The phrase, "whose operations affect commerce," is to be read broadly, to include all types of activities reached under the commerce clause of the Constitution.

Privately operated airports are also included in the category of commercial facilities. They are not, however, places of

public accommodation because they are not terminals used for "specified public transportation." (Transportation by aircraft is specifically excluded from the statutory definition of "specified public transportation.") Thus, privately operated airports are subject to the new construction and alteration requirements of this rule (subpart D) but not to subparts B and C. (Airports operated by public entities are covered by title II of the Act.) Places of public accommodation located within airports, such as restaurants, shops, lounges, or conference centers, however, are covered by subparts B and C of this part.

The statute's definition of "commercial facilities" specifically includes only facilities "that are intended for nonresidential use" and specifically exempts those facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968, as amended (42 U.S.C. 3601 - 3631). The interplay between the Fair Housing Act and the ADA with respect to those facilities that are "places of public accommodation" was the subject of many comments and is addressed in the preamble discussion of the definition of "place of public accommodation."

"Disability." The definition of the term "disability" is comparable to the definition of the term "individual with handicaps" in section 7(8)(B) of the Rehabilitation Act and section 802(h) of the Fair Housing Act. The Education and Labor Committee report makes clear that the analysis of the term "individual with handicaps" by the Department of Health, Education, and Welfare in its regulations implementing section 504 (42 FR 22685 (May 4, 1977)) and the analysis by the Department of Housing and Urban

Development in its regulation implementing the Fair Housing Amendments Act of 1988 (54 FR 3232 (Jan. 23, 1989)) should also apply fully to the term "disability" (Education and Labor report at 50).

The use of the term "disability" instead of "handicap" and the term "individual with a disability" instead of "individual with handicaps" represents an effort by the Congress to make use of up-to-date, currently accepted terminology. The terminology applied to individuals with disabilities is a very significant and sensitive issue. As with racial and ethnic terms, the choice of words to describe a person with a disability is overlaid with stereotypes, patronizing attitudes, and other emotional connotations. Many individuals with disabilities, and organizations representing such individuals, object to the use of such terms as "handicapped person" or "the handicapped." In other recent legislation, Congress also recognized this shift in terminology, e.g., by changing the name of the National Council on the Handicapped to the National Council on Disability (Pub. L. 100 - 630).

In enacting the Americans with Disabilities Act, Congress concluded that it was important for the current legislation to use terminology most in line with the sensibilities of most Americans with disabilities. No change in definition or substance is intended nor should be attributed to this change in phraseology.

The term "disability" means, with respect to an individual --

(A) A physical or mental impairment that substantially limits one or more of the major life activities of such

individual;

(B) A record of such an impairment; or

(C) Being regarded as having such an impairment.

If an individual meets any one of these three tests, he or she is considered to be an individual with a disability for purposes of coverage under the Americans with Disabilities Act.

Congress adopted this same basic definition of "disability," first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988, for a number of reasons. It has worked well since it was adopted in 1974. There is a substantial body of administrative interpretation and judicial precedent on this definition. Finally, it would not be possible to guarantee comprehensiveness by providing a list of specific disabilities, especially because new disorders may be recognized in the future, as they have since the definition was first established in 1974.

Test A -- A Physical or Mental Impairment That Substantially Limits One or More of the Major Life Activities of Such Individual

Physical or mental impairment. Under the first test, an individual must have a physical or mental impairment. As explained in paragraph (1) (i) of the definition, "impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs

(including speech organs that are not respiratory, such as vocal cords, soft palate, and tongue); respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine. It also means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. This list closely tracks the one used in the regulations for section 504 of the Rehabilitation Act of 1973 (see, e.g., 45 CFR 84.3(j)(2)(i)).

Many commenters asked that "traumatic brain injury" be added to the list in paragraph (1)(i). Traumatic brain injury is already included because it is a physiological condition affecting one of the listed body systems, i.e., "neurological." Therefore, it was unnecessary for the Department to add the term to the regulation.

It is not possible to include a list of all the specific conditions, contagious and noncontagious diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that other conditions or disorders may be identified in the future. However, the list of examples in paragraph (1)(iii) of the definition includes: Orthopedic, visual, speech and hearing impairments; cerebral palsy; epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

The examples of "physical or mental impairments" in paragraph (1)(iii) are the same as those contained in many section 504 regulations, except for the addition of the phrase "contagious and noncontagious" to describe the types of diseases and conditions included, and the addition of "HIV disease (symptomatic or asymptomatic)" and "tuberculosis" to the list of examples. These additions are based on the ADA committee reports, caselaw, and official legal opinions interpreting section 504. In School Board of Nassau County v. Arline, 480 U.S. 273 (1987), a case involving an individual with tuberculosis, the Supreme Court held that people with contagious diseases are entitled to the protections afforded by section 504. Following the Arline decision, this Department's Office of Legal Counsel issued a legal opinion that concluded that symptomatic HIV disease is an impairment that substantially limits a major life activity; therefore it has been included in the definition of disability under this part. The opinion also concluded that asymptomatic HIV disease is an impairment that substantially limits a major life activity, either because of its actual effect on the individual with HIV disease or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as though they are disabled. See Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), reprinted in Hearings on S. 933, the Americans with Disabilities Act, Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 101st Cong., 1st Sess. 346 (1989). The phrase "symptomatic or asymptomatic" was inserted in the final rule after "HIV disease" in response to commenters who suggested that the clarification was necessary to give full meaning to the

Department's opinion.

Paragraph (1)(iv) of the definition states that the phrase "physical or mental impairment" does not include homosexuality or bisexuality. These conditions were never considered impairments under other Federal disability laws. Section 511(a) of the statute makes clear that they are likewise not to be considered impairments under the Americans with Disabilities Act.

Physical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair. Nor does it include environmental, cultural, economic, or other disadvantages, such as having a prison record, or being poor. Nor is age a disability. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. However, a person who has these characteristics and also has a physical or mental impairment may be considered as having a disability for purposes of the Americans with Disabilities Act based on the impairment.

Substantial limitation of a major life activity. Under Test A, the impairment must be one that "substantially limits a major life activity." Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. For example, a person who is paraplegic is substantially limited in the major life activity of walking, a person who is blind is substantially limited in the major life activity of seeing, and a person who is mentally retarded is substantially limited in the major life activity of learning. A person with traumatic brain injury is substantially limited in

the major life activities of caring for one's self, learning, and working because of memory deficit, confusion, contextual difficulties, and inability to reason appropriately.

A person is considered an individual with a disability for purposes of Test A, the first prong of the definition, when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person with a minor, trivial impairment, such as a simple infected finger, is not impaired in a major life activity. A person who can walk for 10 miles continuously is not substantially limited in walking merely because, on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.

The Department received many comments on the proposed rule's inclusion of the word "temporary" in the definition of "disability." The preamble indicated that impairments are not necessarily excluded from the definition of "disability" simply because they are temporary, but that the duration, or expected duration, of an impairment is one factor that may properly be considered in determining whether the impairment substantially limits a major life activity. The preamble recognized, however, that temporary impairments, such as a broken leg, are not commonly regarded as disabilities, and only in rare circumstances would the degree of the limitation and its expected duration be substantial: Nevertheless, many commenters objected to inclusion of the word "temporary" both because it is not in the statute and because it is not contained in the definition of "disability" set forth in the title I regulations of the Equal Employment

Opportunity Commission (EEOC). The word "temporary" has been deleted from the final rule to conform with the statutory language. The question of whether a temporary impairment is a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modifications or auxiliary aids and services. For example, a person with hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

Many commenters asked that environmental illness (also known as multiple chemical sensitivity) as well as allergy to cigarette smoke be recognized as disabilities. The Department, however, declines to state categorically that these types of allergies or sensitivities are disabilities, because the determination as to whether an impairment is a disability depends on whether, given the particular circumstances at issue, the impairment substantially limits one or more major life activities (or has a history of, or is regarded as having such an effect).

Sometimes respiratory or neurological functioning is so

severely affected that an individual will satisfy the requirements to be considered disabled under the regulation. Such an individual would be entitled to all of the protections afforded by the Act and this part. In other cases, individuals may be sensitive to environmental elements or to smoke but their sensitivity will not rise to the level needed to constitute a disability. For example, their major life activity of breathing may be somewhat, but not substantially, impaired. In such circumstances, the individuals are not disabled and are not entitled to the protections of the statute despite their sensitivity to environmental agents.

In sum, the determination as to whether allergies to cigarette smoke, or allergies or sensitivities characterized by the commenters as environmental illness are disabilities covered by the regulation must be made using the same case-by-case analysis that is applied to all other physical or mental impairments. Moreover, the addition of specific regulatory provisions relating to environmental illness in the final rule would be inappropriate at this time pending future consideration of the issue by the Architectural and Transportation Barriers Compliance Board, the Environmental Protection Agency, and the Occupational Safety and Health Administration of the Department of Labor.

Test B -- A Record of Such an Impairment

This test is intended to cover those who have a record of an impairment. As explained in paragraph (3) of the rule's definition of disability, this includes a person who has a history of an impairment that substantially limited a major life activity, such as someone who has recovered from an impairment. It also includes persons who have been

misclassified as having an impairment.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment is prohibited. Frequently occurring examples of the first group (those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (those who have been misclassified as having an impairment) are persons who have been misclassified as having mental retardation or mental illness.

Test C -- Being Regarded as Having Such an Impairment

This test, as contained in paragraph (4) of the definition, is intended to cover persons who are treated by a private entity or public accommodation as having a physical or mental impairment that substantially limits a major life activity. It applies when a person is treated as if he or she has an impairment that substantially limits a major life activity, regardless of whether that person has an impairment.

The Americans with Disabilities Act uses the same "regarded as" test set forth in the regulations implementing section 504 of the Rehabilitation Act. See, e.g., 28 CFR 42.540(k)(2)(iv), which provides:

(iv) "Is regarded as having an impairment" means (A) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as

constituting such a limitation; (B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) Has none of the impairments defined in paragraph (k)(2)(i) of this section but is treated by a recipient as having such an impairment.

The perception of the private entity or public accommodation is a key element of this test. A person who perceives himself or herself to have an impairment, but does not have an impairment, and is not treated as if he or she has an impairment, is not protected under this test. A person would be covered under this test if a restaurant refused to serve that person because of a fear of "negative reactions" of others to that person. A person would also be covered if a public accommodation refused to serve a patron because it perceived that the patron had an impairment that limited his or her enjoyment of the goods or services being offered.

For example, persons with severe burns often encounter discrimination in community activities, resulting in substantial limitation of major life activities. These persons would be covered under this test based on the attitudes of others towards the impairment, even if they did not view themselves as "impaired."

The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in Arline, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could

nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." Id. at 283. The Court concluded that, by including this test in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." Id. at 284.

Thus, a person who is not allowed into a public accommodation because of the myths, fears, and stereotypes associated with disabilities would be covered under this third test whether or not the person's physical or mental condition would be considered a disability under the first or second test in the definition.

If a person is refused admittance on the basis of an actual or perceived physical or mental condition, and the public accommodation can articulate no legitimate reason for the refusal (such as failure to meet eligibility criteria), a perceived concern about admitting persons with disabilities could be inferred and the individual would qualify for coverage under the "regarded as" test. A person who is covered because of being regarded as having an impairment is not required to show that the public accommodation's perception is inaccurate (e.g., that he will be accepted by others, or that insurance rates will not increase) in order to be admitted to the public accommodation.

Paragraph (5) of the definition lists certain conditions that are not included within the definition of "disability." The excluded conditions are: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity

disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. Unlike homosexuality and bisexuality, which are not considered impairments under either the Americans with Disabilities Act (see the definition of "disability," paragraph (1)(iv)) or section 504, the conditions listed in paragraph (5), except for transvestism, are not necessarily excluded as impairments under section 504. (Transvestism was excluded from the definition of disability for section 504 by the Fair Housing Amendments Act of 1988, Pub. L. 100 - 430, Sec.6(b).) The phrase "current illegal use of drugs" used in this definition is explained in the preamble to Sec.36.209.

"Facility." "Facility" means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located. Committee reports made clear that the definition of facility was drawn from the definition of facility in current Federal regulations (see, e.g., Education and Labor report at 114). It includes both indoor and outdoor areas where human-constructed improvements, structures, equipment, or property have been added to the natural environment.

The term "rolling stock or other conveyances" was not included in the definition of facility in the proposed rule. However, commenters raised questions about the applicability of this part to places of public accommodation operated in mobile facilities (such as cruise ships, floating

restaurants, or mobile health units). Those places of public accommodation are covered under this part, and would be included in the definition of "facility." Thus the requirements of subparts B and C would apply to those places of public accommodation. For example, a covered entity could not discriminate on the basis of disability in the full and equal enjoyment of the facilities (Sec.36.201). Similarly, a cruise line could not apply eligibility criteria to potential passengers in a manner that would screen out individuals with disabilities, unless the criteria are "necessary," as provided in Sec.36.301.

However, standards for new construction and alterations of such facilities are not yet included in the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) adopted by Sec.36.406 and incorporated in appendix A. The Department therefore will not interpret the new construction and alterations provisions of subpart D to apply to the types of facilities discussed here, pending further development of specific requirements.

Requirements pertaining to accessible transportation services provided by public accommodations are included in Sec.36.310 of this part; standards pertaining to accessible vehicles will be issued by the Secretary of Transportation pursuant to section 306 of the Act, and will be codified at 49 CFR part 37.

A public accommodation has obligations under this rule with respect to a cruise ship to the extent that its operations are subject to the laws of the United States.

The definition of "facility" only includes the site over which the private entity may exercise control or on which a place of public accommodation or a commercial facility is located. It does not include, for example, adjacent roads or walks controlled by a public entity that is not subject to this part. Public entities are subject to the requirements of title II of the Act. The Department's regulation implementing title II, which will be codified at 28 CFR part 35, addresses the obligations of public entities to ensure accessibility by providing curb ramps at pedestrian walkways.

"Individual with a disability" means a person who has a disability but does not include an individual who is currently illegally using drugs, when the public accommodation acts on the basis of such use. The phrase "current illegal use of drugs" is explained in the preamble to Sec.36.209.

"Place of public accommodation." The term "place of public accommodation" is an adaptation of the statutory definition of "public accommodation" in section 301(7) of the ADA and appears as an element of the regulatory definition of public accommodation. The final rule defines "place of public accommodation" as a facility, operated by a private entity, whose operations affect commerce and fall within at least one of 12 specified categories. The term "public accommodation," on the other hand, is reserved by the final rule for the private entity that owns, leases (or leases to), or operates a place of public accommodation. It is the public accommodation, and not the place of public accommodation, that is subject to the regulation's nondiscrimination requirements. Placing the obligation not to discriminate on the public accommodation, as defined in the

rule, is consistent with section 302(a) of the ADA, which places the obligation not to discriminate on any person who owns, leases (or leases to), or operates a place of public accommodation.

Facilities operated by government agencies or other public entities as defined in this section do not qualify as places of public accommodation. The actions of public entities are governed by title II of the ADA and will be subject to regulations issued by the Department of Justice under that title. The receipt of government assistance by a private entity does not by itself preclude a facility from being considered as a place of public accommodation.

The definition of place of public accommodation incorporates the 12 categories of facilities represented in the statutory definition of public accommodation in section 301(7) of the ADA:

1. Places of lodging.
2. Establishments serving food or drink.
3. Places of exhibition or entertainment.
4. Places of public gathering.
5. Sales or rental establishments.
6. Service establishments.
7. Stations used for specified public transportation.
8. Places of public display or collection.
9. Places of recreation.
10. Places of education.

11. Social service center establishments.

12. Places of exercise or recreation.

In order to be a place of public accommodation, a facility must be operated by a private entity, its operations must affect commerce, and it must fall within one of these 12 categories. While the list of categories is exhaustive, the representative examples of facilities within each category are not. Within each category only a few examples are given. The category of social service center establishments would include not only the types of establishments listed, day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies, but also establishments such as substance abuse treatment centers, rape crisis centers, and halfway houses. As another example, the category of sales or rental establishments would include an innumerable array of facilities that would sweep far beyond the few examples given in the regulation. For example, other retail or wholesale establishments selling or renting items, such as bookstores, videotape rental stores, car rental establishment, pet stores, and jewelry stores would also be covered under this category, even though they are not specifically listed.

Several commenters requested clarification as to the coverage of wholesale establishments under the category of "sales or rental establishments." The Department intends for wholesale establishments to be covered under this category as places of public accommodation except in cases where they sell exclusively to other businesses and not to individuals. For example, a company that grows food produce and supplies its crops exclusively to food processing corporations on a wholesale basis does not become a public accommodation because of these

transactions. If this company operates a road side stand where its crops are sold to the public, the road side stand would be a sales establishment covered by the ADA. Conversely, a sales establishment that markets its goods as "wholesale to the public" and sells to individuals would not be exempt from ADA coverage despite its use of the word "wholesale" as a marketing technique.

Of course, a company that operates a place of public accommodation is subject to this part only in the operation of that place of public accommodation. In the example given above, the wholesale produce company that operates a road side stand would be a public accommodation only for the purposes of the operation of that stand. The company would be prohibited from discriminating on the basis of disability in the operation of the road side stand, and it would be required to remove barriers to physical access to the extent that it is readily achievable to do so (see Sec.36.304); however, in the event that it is not readily achievable to remove barriers, for example, by replacing a gravel surface or regrading the area around the stand to permit access by persons with mobility impairments, the company could meet its obligations through alternative methods of making its goods available, such as delivering produce to a customer in his or her car (see Sec.36.305). The concepts of readily achievable barrier removal and alternatives to barrier removal are discussed further in the preamble discussion of Sec..36.304 and 36.305.

Even if a facility does not fall within one of the 12 categories, and therefore does not qualify as a place of public accommodation, it still may be a commercial facility as defined in Sec.36.104 and be subject to the new construction and alterations requirements of subpart D.

A number of commenters questioned the treatment of residential hotels and other residential facilities in the Department's proposed rule. These commenters were essentially seeking resolution of the relationship between the Fair Housing Act and the ADA concerning facilities that are both residential in nature and engage in activities that would cause them to be classified as "places of public accommodation" under the ADA. The ADA's express exemption relating to the Fair Housing Act applies only to "commercial facilities" and not to "places of public accommodation."

A facility whose operations affect interstate commerce is a place of public accommodation for purposes of the ADA to the extent that its operations include those types of activities engaged in or services provided by the facilities contained on the list of 12 categories in section 301(7) of the ADA. Thus, a facility that provides social services would be considered a "social service center establishment." Similarly, the category "places of lodging" would exclude solely residential facilities because the nature of a place of lodging contemplates the use of the facility for short-term stays.

Many facilities, however, are mixed use facilities. For example, in a large hotel that has a separate residential apartment wing, the residential wing would not be covered by the ADA because of the nature of the occupancy of that part of the facility. This residential wing would, however, be covered by the Fair Housing Act. The separate nonresidential accommodations in the rest of the hotel would be a place of lodging, and thus a public accommodation subject to the

requirements of this final rule. If a hotel allows both residential and short-term stays, but does not allocate space for these different uses in separate, discrete units, both the ADA and the Fair Housing Act may apply to the facility. Such determinations will need to be made on a case-by-case basis. Any place of lodging of the type described in paragraph (1) of the definition of place of public accommodation and that is an establishment located within a building that contains not more than five rooms for rent or hire and is actually occupied by the proprietor of the establishment as his or her residence is not covered by the ADA. (This exclusion from coverage does not apply to other categories of public accommodations, for example, professional offices or homeless shelters, that are located in a building that is also occupied as a private residence.)

A number of commenters noted that the term "residential hotel" may also apply to a type of hotel commonly known as a "single room occupancy hotel." Although such hotels or portions of such hotels may fall under the Fair Housing Act when operated or used as long-term residences, they are also considered "places of lodging" under the ADA when guests of such hotels are free to use them on a short-term basis. In addition, "single room occupancy hotels" may provide social services to their guests, often through the operation of Federal or State grant programs. In such a situation, the facility would be considered a "social service center establishment" and thus covered by the ADA as a place of public accommodation, regardless of the length of stay of the occupants.

A similar analysis would also be applied to other residential facilities that provide social services, including homeless

shelters, shelters for people seeking refuge from domestic violence, nursing homes, residential care facilities, and other facilities where persons may reside for varying lengths of time. Such facilities should be analyzed under the Fair Housing Act to determine the application of that statute. The ADA, however, requires a separate and independent analysis. For example, if the facility, or a portion of the facility, is intended for or permits short-term stays, or if it can appropriately be categorized as a service establishment or as a social service establishment, then the facility or that portion of the facility used for the covered purpose is a place of public accommodation under the ADA. For example, a homeless shelter that is intended and used only for long-term residential stays and that does not provide social services to its residents would not be covered as a place of public accommodation. However, if this facility permitted short-term stays or provided social services to its residents, it would be covered under the ADA either as a "place of lodging" or as a "social service center establishment," or as both.

A private home, by itself, does not fall within any of the 12 categories. However, it can be covered as a place of public accommodation to the extent that it is used as a facility that would fall within one of the 12 categories. For example, if a professional office of a dentist, doctor, or psychologist is located in a private home, the portion of the home dedicated to office use (including areas used both for the residence and the office, e.g., the entrance to the home that is also used as the entrance to the professional office) would be considered a place of public accommodation. Places of public accommodation located in residential facilities are specifically addressed in Sec.36.207.

If a tour of a commercial facility that is not otherwise a place of public accommodation, such as, for example, a factory or a movie studio production set, is open to the general public, the route followed by the tour is a place of public accommodation and the tour must be operated in accordance with the rule's requirements for public accommodations. The place of public accommodation defined by the tour does not include those portions of the commercial facility that are merely viewed from the tour route. Hence, the barrier removal requirements of Sec.36.304 only apply to the physical route followed by the tour participants and not to work stations or other areas that are merely adjacent to, or within view of, the tour route. If the tour is not open to the general public, but rather is conducted, for example, for selected business colleagues, partners, customers, or consultants, the tour route is not a place of public accommodation and the tour is not subject to the requirements for public accommodations.

Public accommodations that receive Federal financial assistance are subject to the requirements of section 504 of the Rehabilitation Act as well as the requirements of the ADA.

Private schools, including elementary and secondary schools, are covered by the rule as places of public accommodation. The rule itself, however, does not require a private school to provide a free appropriate education or develop an individualized education program in accordance with regulations of the Department of Education implementing section 504 of the Rehabilitation Act of 1973, as amended (34 CFR part 104), and regulations implementing the Individuals with Disabilities Education Act

(34 CFR part 300). The receipt of Federal assistance by a private school, however, would trigger application of the Department of Education's regulations to the extent mandated by the particular type of assistance received.

"Private club." The term "private club" is defined in accordance with section 307 of the ADA as a private club or establishment exempted from coverage under title II of the Civil Rights Act of 1964. Title II of the 1964 Act exempts any "private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of [a place of public accommodation as defined in title II]." The rule, therefore, as reflected in Sec.36.102(e) of the application section, limits the coverage of private clubs accordingly. The obligations of a private club that rents space to any other private entity for the operation of a place of public accommodation are discussed further in connection with Sec.36.201.

In determining whether a private entity qualifies as a private club under title II, courts have considered such factors as the degree of member control of club operations, the selectivity of the membership selection process, whether substantial membership fees are charged, whether the entity is operated on a nonprofit basis, the extent to which the facilities are open to the public, the degree of public funding, and whether the club was created specifically to avoid compliance with the Civil Rights Act. See e.g., Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Daniel v. Paul, 395 U.S. 298 (1969); Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974); Anderson v. Pass Christian Isles Golf Club, Inc., 488 F.2d 855 (5th Cir. 1974); Smith v.

YMCA, 462 F.2d 634 (5th Cir. 1972); Stout v. YMCA, 404 F.2d 687 (5th Cir. 1968); United States v. Richberg, 398 F.2d 523 (5th Cir. 1968); Nesmith v. YMCA, 397 F.2d 96 (4th Cir. 1968); United States v. Lansdowne Swim Club, 713 F. Supp. 785 (E.D. Pa. 1989); Durham v. Red Lake Fishing and Hunting Club, Inc., 666 F. Supp. 954 (W.D. Tex. 1987); New York v. Ocean Club, Inc., 602 F. Supp. 489 (E.D.N.Y. 1984); Brown v. Loudoun Golf and Country Club, Inc., 573 F. Supp. 399 (E.D. Va. 1983); United States v. Trustees of Fraternal Order of Eagles, 472 F. Supp. 1174 (E.D. Wis. 1979); Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (D. Conn. 1974).

"Private entity." The term "private entity" is defined as any individual or entity other than a public entity. It is used as part of the definition of "public accommodation" in this section.

The definition adds "individual" to the statutory definition of private entity (see section 301(6) of the ADA). This addition clarifies that an individual may be a private entity and, therefore, may be considered a public accommodation if he or she owns, leases (or leases to), or operates a place of public accommodation. The explicit inclusion of individuals under the definition of private entity is consistent with section 302(a) of the ADA, which broadly prohibits discrimination on the basis of disability by any person who owns, leases (or leases to), or operates a place of public accommodation.

"Public accommodation." The term "public accommodation" means a private entity that owns, leases (or leases to), or

operates a place of public accommodation. The regulatory term, "public accommodation," corresponds to the statutory term, "person," in section 302(a) of the ADA. The ADA prohibits discrimination "by any person who owns, leases (or leases to), or operates a place of public accommodation." The text of the regulation consequently places the ADA's nondiscrimination obligations on "public accommodations" rather than on "persons" or on "places of public accommodation."

As stated in Sec.36.102(b)(2), the requirements of subparts B and C obligate a public accommodation only with respect to the operations of a place of public accommodation. A public accommodation must also meet the requirements of subpart D with respect to facilities used as, or designed or constructed for use as, places of public accommodation or commercial facilities.

"Public entity." The term "public entity" is defined in accordance with section 201(1) of the ADA as any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act). It is used in the definition of "private entity" in Sec.36.104. Public entities are excluded from the definition of private entity and therefore cannot qualify as public accommodations under this regulation. However, the actions of public entities are covered by title II of the ADA and by the Department's title II regulations codified at 28 CFR part 35.

"Readily achievable." The definition of "readily achievable" follows the statutory definition of that term in section 301(9) of the ADA. Readily achievable means easily accomplishable and able to be carried out without much difficulty or expense. The term is used as a limitation on the obligation to remove barriers under Sec..36.304(a), 36.305(a), 36.308(a), and 36.310(b). Further discussion of the meaning and application of the term "readily achievable" may be found in the preamble section for Sec.36.304.

The definition lists factors to be considered in determining whether barrier removal is readily achievable in any particular circumstance. A significant number of commenters objected to Sec.36.306 of the proposed rule, which listed identical factors to be considered for determining "readily achievable" and "undue burden" together in one section. They asserted that providing a consolidated section blurred the distinction between the level of effort required by a public accommodation under the two standards. The readily achievable standard is a "lower" standard than the "undue burden" standard in terms of the level of effort required, but the factors used in determining whether an action is readily achievable or would result in an undue burden are identical (See Education and Labor report at 109). Although the preamble to the proposed rule clearly delineated the relationship between the two standards, to eliminate any confusion the Department has deleted Sec.36.306 of the proposed rule. That section, in any event, as other commenters noted, had merely repeated the lists of factors contained in the definitions of readily achievable and undue burden.

The list of factors included in the definition is derived from section 301(9) of the ADA. It reflects the congressional

intention that a wide range of factors be considered in determining whether an action is readily achievable. It also takes into account that many local facilities are owned or operated by parent corporations or entities that conduct operations at many different sites. This section makes clear that, in some instances, resources beyond those of the local facility where the barrier must be removed may be relevant in determining whether an action is readily achievable. One must also evaluate the degree to which any parent entity has resources that may be allocated to the local facility.

The statutory list of factors in section 301(9) of the Act uses the term "covered entity" to refer to the larger entity of which a particular facility may be a part. "Covered entity" is not a defined term in the ADA and is not used consistently throughout the Act. The definition, therefore, substitutes the term "parent entity" in place of "covered entity" in paragraphs (3), (4), and (5) when referring to the larger private entity whose overall resources may be taken into account. This usage is consistent with the House Judiciary Committee's use of the term "parent company" to describe the larger entity of which the local facility is a part (H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 40 - 41, 54 - 55 (1990) (hereinafter "Judiciary report")).

A number of commenters asked for more specific guidance as to when and how the resources of a parent corporation or entity are to be taken into account in determining what is readily achievable. The Department believes that this complex issue is most appropriately resolved on a case-by-case basis. As the comments reflect, there is a wide variety of possible relationships between the site in question and any parent corporation or other entity. It would be

unwise to posit legal ramifications under the ADA of even generic relationships (e.g., banks involved in foreclosures or insurance companies operating as trustees or in other similar fiduciary relationships), because any analysis will depend so completely on the detailed fact situations and the exact nature of the legal relationships involved. The final rule does, however, reorder the factors to be considered. This shift and the addition of the phrase "if applicable" make clear that the line of inquiry concerning factors will start at the site involved in the action itself. This change emphasizes that the overall resources, size, and operations of the parent corporation or entity should be considered to the extent appropriate in light of "the geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity."

Although some commenters sought more specific numerical guidance on the definition of readily achievable, the Department has declined to establish in the final rule any kind of numerical formula for determining whether an action is readily achievable. It would be difficult to devise a specific ceiling on compliance costs that would take into account the vast diversity of enterprises covered by the ADA's public accommodations requirements and the economic situation that any particular entity would find itself in at any moment. The final rule, therefore, implements the flexible case-by-case approach chosen by Congress.

A number of commenters requested that security considerations be explicitly recognized as a factor in determining whether a barrier removal action is readily achievable. The Department believes that legitimate safety requirements, including crime prevention measures, may be

taken into account so long as they are based on actual risks and are necessary for safe operation of the public accommodation. This point has been included in the definition.

Some commenters urged the Department not to consider acts of barrier removal in complete isolation from each other in determining whether they are readily achievable. The Department believes that it is appropriate to consider the cost of other barrier removal actions as one factor in determining whether a measure is readily achievable.

"Service animal." The term "service animal" encompasses any guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability. The term is used in Sec.36.302(c), which requires public accommodations generally to modify policies, practices, and procedures to accommodate the use of service animals in places of public accommodation.

"Specified public transportation." The definition of "specified public transportation" is identical to the statutory definition in section 301(10) of the ADA. The term means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis. It is used in category (7) of the definition of "place of public accommodation," which includes stations used for specified public transportation.

The effect of this definition, which excludes transportation by aircraft, is that it excludes privately operated airports from coverage as places of public accommodation. However, places of public accommodation located within airports would be covered by this part. Airports that are operated by public entities are covered by title II of the ADA and, if they are operated as part of a program receiving Federal financial assistance, by section 504 of the Rehabilitation Act. Privately operated airports are similarly covered by section 504 if they are operated as part of a program receiving Federal financial assistance. The operations of any portion of any airport that are under the control of an air carrier are covered by the Air Carrier Access Act. In addition, airports are covered as commercial facilities under this rule.

"State." The definition of "State" is identical to the statutory definition in section 3(3) of the ADA. The term is used in the definitions of "commerce" and "public entity" in Sec.36.104.

"Undue burden." The definition of "undue burden" is analogous to the statutory definition of "undue hardship" in employment under section 101(10) of the ADA. The term undue burden means "significant difficulty or expense" and serves as a limitation on the obligation to provide auxiliary aids and services under Sec.36.303 and Sec..36.309 (b)(3) and (c)(3). Further discussion of the meaning and application of the term undue burden may be found in the preamble discussion of Sec.36.303.

The definition lists factors considered in determining whether provision of an auxiliary aid or service in any

particular circumstance would result in an undue burden. The factors to be considered in determining whether an action would result in an undue burden are identical to those to be considered in determining whether an action is readily achievable. However, "readily achievable" is a lower standard than "undue burden" in that it requires a lower level of effort on the part of the public accommodation (see Education and Labor report at 109).

Further analysis of the factors to be considered in determining undue burden may be found in the preamble discussion of the definition of the term "readily achievable."

Subpart B -- General Requirements

Subpart B includes general prohibitions restricting a public accommodation from discriminating against people with disabilities by denying them the opportunity to benefit from goods or services, by giving them unequal goods or services, or by giving them different or separate goods or services. These general prohibitions are patterned after the basic, general prohibitions that exist in other civil rights laws that prohibit discrimination on the basis of race, sex, color, religion, or national origin.

Section 36.201 General

Section 36.201(a) contains the general rule that prohibits discrimination on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation.

Full and equal enjoyment means the right to participate and to have an equal opportunity to obtain the same results as others to the extent possible with such accommodations as may be required by the Act and these regulations. It does not mean that an individual with a disability must achieve an identical result or level of achievement as persons without a disability. For example, an exercise class cannot exclude a person who uses a wheelchair because he or she cannot do all of the exercises and derive the same result from the class as persons without a disability.

Section 302(a) of the ADA states that the prohibition against discrimination applies to "any person who owns, leases (or leases to), or operates a place of public accommodation," and this language is reflected in Sec.36.201(a). The coverage is quite extensive and would include sublessees, management companies, and any other entity that owns, leases, leases to, or operates a place of public accommodation, even if the operation is only for a short time.

The first sentence of paragraph (b) of Sec.36.201 reiterates the general principle that both the landlord that owns the building that houses the place of public accommodation, as well as the tenant that owns or operates the place of public accommodation, are public accommodations subject to the requirements of this part. Although the statutory language could be interpreted as placing equal responsibility on all private entities, whether lessor, lessee, or operator of a public accommodation, the committee reports suggest that liability may be allocated. Section 36.201(b) of that section of the proposed rule attempted to allocate liability in the

regulation itself. Paragraph (b)(2) of that section made a specific allocation of liability for the obligation to take readily achievable measures to remove barriers, and paragraph (b)(3) made a specific allocation for the obligation to provide auxiliary aids.

Numerous commenters pointed out that these allocations would not apply in all situations. Some asserted that paragraph (b)(2) of the proposed rule only addressed the situation when a lease gave the tenant the right to make alterations with permission of the landlord, but failed to address other types of leases, e.g., those that are silent on the right to make alterations, or those in which the landlord is not permitted to enter a tenant's premises to make alterations. Several commenters noted that many leases contain other clauses more relevant to the ADA than the alterations clause. For example, many leases contain a "compliance clause," a clause which allocates responsibility to a particular party for compliance with all relevant Federal, State, and local laws. Many commenters pointed out various types of relationships that were left unaddressed by the regulation, e.g., sale and leaseback arrangements where the landlord is a financial institution with no control or responsibility for the building; franchises; subleases; and management companies which, at least in the hotel industry, often have control over operations but are unable to make modifications to the premises.

Some commenters raised specific questions as to how the barrier removal allocation would work as a practical matter. Paragraph (b)(2) of the proposed rule provided that the burden of making readily achievable modifications within the tenant's place of public accommodation would shift to

the landlord when the modifications were not readily achievable for the tenant or when the landlord denied a tenant's request for permission to make such modifications. Commenters noted that the rule did not specify exactly when the burden would actually shift from tenant to landlord and whether the landlord would have to accept a tenant's word that a particular action is not readily achievable. Others questioned if the tenant should be obligated to use alternative methods of barrier removal before the burden shifts. In light of the fact that readily achievable removal of barriers can include such actions as moving of racks and displays, some commenters doubted the appropriateness of requiring a landlord to become involved in day-to-day operations of its tenants' businesses.

The Department received widely differing comments in response to the preamble question asking whether landlord and tenant obligations should vary depending on the length of time remaining on an existing lease. Many suggested that tenants should have no responsibilities in "shorter leases," which commenters defined as ranging anywhere from 90 days to three years. Other commenters pointed out that the time remaining on the lease should not be a factor in the rule's allocation of responsibilities, but is relevant in determining what is readily achievable for the tenant. The Department agrees with this latter approach and will interpret the rule in that manner.

In recognition of the somewhat limited applicability of the allocation scheme contained in the proposed rule, paragraphs (b)(2) and (b)(3) have been deleted from the final rule. The Department has substituted instead a statement that allocation of responsibility as between the parties for

taking readily achievable measures to remove barriers and to provide auxiliary aids and services both in common areas and within places of public accommodation may be determined by the lease or other contractual relationships between the parties. The ADA was not intended to change existing landlord/tenant responsibilities as set forth in the lease. By deleting specific provisions from the rule, the Department gives full recognition to this principle. As between the landlord and tenant, the extent of responsibility for particular obligations may be, and in many cases probably will be, determined by contract.

The suggested allocation of responsibilities contained in the proposed rule may be used if appropriate in a particular situation. Thus, the landlord would generally be held responsible for making readily achievable changes and providing auxiliary aids and services in common areas and for modifying policies, practices, or procedures applicable to all tenants, and the tenant would generally be responsible for readily achievable changes, provision of auxiliary aids, and modification of policies within its own place of public accommodation.

Many commenters objected to the proposed rule's allocation of responsibility for providing auxiliary aids and services solely to the tenant, pointing out that this exclusive allocation may not be appropriate in the case of larger public accommodations that operate their businesses by renting space out to smaller public accommodations. For example, large theaters often rent to smaller traveling companies and hospitals often rely on independent contractors to provide childbirth classes. Groups representing persons with disabilities objected to the proposed rule because, in their

view, it permitted the large theater or hospital to evade ADA responsibilities by leasing to independent smaller entities. They suggested that these types of public accommodations are not really landlords because they are in the business of providing a service, rather than renting space, as in the case of a shopping center or office building landlord. These commenters believed that responsibility for providing auxiliary aids should shift to the landlord, if the landlord relies on a smaller public accommodation or independent contractor to provide services closely related to those of the larger public accommodation, and if the needed auxiliary aids prove to be an undue burden for the smaller public accommodation. The final rule no longer lists specific allocations to specific parties but, rather, leaves allocation of responsibilities to the lease negotiations. Parties are, therefore, free to allocate the responsibility for auxiliary aids.

Section 36.201(b)(4) of the proposed rule, which provided that alterations by a tenant on its own premises do not trigger a path of travel obligation on the landlord, has been moved to Sec.36.403(d) of the final rule.

An entity that is not in and of itself a public accommodation, such as a trade association or performing artist, may become a public accommodation when it leases space for a conference or performance at a hotel, convention center, or stadium. For an entity to become a public accommodation when it is the lessee of space, however, the Department believes that consideration in some form must be given. Thus, a Boy Scout troop that accepts donated space does not become a public accommodation because the troop has not "leased" space, as required by the ADA.

As a public accommodation, the trade association or performing artist will be responsible for compliance with this part. Specific responsibilities should be allocated by contract, but, generally, the lessee should be responsible for providing auxiliary aids and services (which could include interpreters, Braille programs, etc.) for the participants in its conference or performance as well as for assuring that displays are accessible to individuals with disabilities.

Some commenters suggested that the rule should allocate responsibilities for areas other than removal of barriers and auxiliary aids. The final rule leaves allocation of all areas to the lease negotiations. However, in general landlords should not be given responsibility for policies a tenant applies in operating its business, if such policies are solely those of the tenant. Thus, if a restaurant tenant discriminates by refusing to seat a patron, it would be the tenant, and not the landlord, who would be responsible, because the discriminatory policy is imposed solely by the tenant and not by the landlord. If, however, a tenant refuses to modify a "no pets" rule to allow service animals in its restaurant because the landlord mandates such a rule, then both the landlord and the tenant would be liable for violation of the ADA when a person with a service dog is refused entrance. The Department wishes to emphasize, however, that the parties are free to allocate responsibilities in any way they choose.

Private clubs are also exempt from the ADA. However, consistent with title II of the Civil Rights Act (42 U.S.C. 2000a(e), a private club is considered a public accommodation to the extent that "the facilities of such establishment are made available to the customers or patrons" of a place of public accommodation. Thus, if a

private club runs a day care center that is open exclusively to its own members, the club, like the church in the example above, would have no responsibility for compliance with the ADA. Nor would the day care center have any responsibilities because it is part of the private club exempt from the ADA.

On the other hand, if the private club rents to a day care center that is open to the public, then the private club would have the same obligations as any other public accommodation that functions as a landlord with respect to compliance with title III within the day care center. In such a situation, both the private club that "leases to" a public accommodation and the public accommodation lessee (the day care center) would be subject to the ADA. This same principle would apply if the private club were to rent to, for example, a bar association, which is not generally a public accommodation but which, as explained above, becomes a public accommodation when it leases space for a conference.

Section 36.202 Activities

Section 36.202 sets out the general forms of discrimination prohibited by title III of the ADA. These general prohibitions are further refined by the specific prohibitions in subpart C. Section 36.213 makes clear that the limitations on the ADA's requirements contained in subpart C, such as "necessity" (Sec.36.301(a)) and "safety" (Sec.36.301(b)), are applicable to the prohibitions in Sec.36.202. Thus, it is unnecessary to add these limitations to Sec.36.202 as has been requested by some commenters. In addition, the language of Sec.36.202 very closely tracks the language of section 302(b)(1)(A) of the Act, and that statutory provision

does not expressly contain these limitations.

Deny participation -- Section 36.202(a) provides that it is discriminatory to deny a person with a disability the right to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

A public accommodation may not exclude persons with disabilities on the basis of disability for reasons other than those specifically set forth in this part. For example, a public accommodation cannot refuse to serve a person with a disability because its insurance company conditions coverage or rates on the absence of persons with disabilities. This is a frequent basis of exclusion from a variety of community activities and is prohibited by this part.

Unequal benefit -- Section 36.202(b) prohibits services or accommodations that are not equal to those provided others. For example, persons with disabilities must not be limited to certain performances at a theater.

Separate benefit -- Section 36.202(c) permits different or separate benefits or services only when necessary to provide persons with disabilities opportunities as effective as those provided others. This paragraph permitting separate benefits "when necessary" should be read together with Sec.36.203(a), which requires integration in "the most integrated setting appropriate to the needs of the individual." The preamble to that section provides further guidance on separate programs. Thus, this section would not prohibit the designation of parking spaces for persons with disabilities.

Each of the three paragraphs (a) - (c) prohibits discrimination against an individual or class of individuals "either directly or through contractual, licensing, or other arrangements." The intent of the contractual prohibitions of these paragraphs is to prohibit a public accommodation from doing indirectly, through a contractual relationship, what it may not do directly. Thus, the "individual or class of individuals" referenced in the three paragraphs is intended to refer to the clients and customers of the public accommodation that entered into a contractual arrangement. It is not intended to encompass the clients or customers of other entities. A public accommodation, therefore, is not liable under this provision for discrimination that may be practiced by those with whom it has a contractual relationship, when that discrimination is not directed against its own clients or customers. For example, if an amusement park contracts with a food service company to operate its restaurants at the park, the amusement park is not responsible for other operations of the food service company that do not involve clients or customers of the amusement park. Section 36.202(d) makes this clear by providing that the term "individual or class of individuals" refers to the clients or customers of the public accommodation that enters into the contractual, licensing, or other arrangement.

Section 36.203 Integrated Settings

Section 36.203 addresses the integration of persons with disabilities. The ADA recognizes that the provision of goods and services in an integrated manner is a fundamental tenet of nondiscrimination on the basis of disability. Providing segregated accommodations and services relegates persons

with disabilities to the status of second-class citizens. For example, it would be a violation of this provision to require persons with mental disabilities to eat in the back room of a restaurant or to refuse to allow a person with a disability the full use of a health spa because of stereotypes about the person's ability to participate. Section 36.203(a) states that a public accommodation shall afford goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual. Section 36.203(b) specifies that, notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Section 306.203(c), which is derived from section 501(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public accommodations are required to make decisions based on facts applicable to individuals and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do.

Sections 36.203 (b) and (c) make clear that individuals with disabilities cannot be denied the opportunity to participate in

programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.

For example, a person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this section to require the person who is blind to avail himself or herself of the special tour. Modified participation for persons with disabilities must be a choice, not a requirement.

Further, it would not be a violation of this section for an establishment to offer recreational programs specially designed for children with mobility impairments in those limited circumstances. However, it would be a violation of this section if the entity then excluded these children from other recreational services made available to nondisabled children, or required children with disabilities to attend only designated programs.

Many commenters asked that the Department clarify a public accommodation's obligations within the integrated program when it offers a separate program, but an individual with a disability chooses not to participate in the separate program. It is impossible to make a blanket statement as to what level of auxiliary aids or modifications are required in the integrated program. Rather, each situation must be assessed individually. Assuming the

integrated program would be appropriate for a particular individual, the extent to which that individual must be provided with modifications will depend not only on what the individual needs but also on the limitations set forth in subpart C. For example, it may constitute an undue burden for a particular public accommodation, which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the integrated program. The Department cannot identify categorically the level of assistance or aid required in the integrated program.

The preamble to the proposed rule contained a statement that some interpreted as encouraging the continuation of separate schools, sheltered workshops, special recreational programs, and other similar programs. It is important to emphasize that Sec.36.202(c) only calls for separate programs when such programs are "necessary" to provide as effective an opportunity to individuals with disabilities as to other individuals. Likewise, Sec.36.203(a) only permits separate programs when a more integrated setting would not be "appropriate." Separate programs are permitted, then, in only limited circumstances. The sentence at issue has been deleted from the preamble because it was too broadly stated and had been erroneously interpreted as Departmental encouragement of separate programs without qualification.

The proposed rule's reference in Sec.36.203(b) to separate programs or activities provided in accordance with "this section" has been changed to "this subpart" in recognition of the fact that separate programs or activities may, in some limited circumstances, be permitted not only by Sec.36.203(a) but also by Sec.36.202(c).

In addition, some commenters suggested that the individual with the disability is the only one who can decide whether a setting is "appropriate" and what the "needs" are. Others suggested that only the public accommodation can make these determinations. The regulation does not give exclusive responsibility to either party. Rather, the determinations are to be made based on an objective view, presumably one which would take into account views of both parties.

Some commenters expressed concern that Sec.36.203(c), which states that nothing in the rule requires an individual with a disability to accept special accommodations and services provided under the ADA, could be interpreted to allow guardians of infants or older people with disabilities to refuse medical treatment for their wards. Section 36.203(c) has been revised to make it clear that paragraph (c) is inapplicable to the concern of the commenters. A new paragraph (c)(2) has been added stating that nothing in the regulation authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual. New paragraph (c) clarifies that neither the ADA nor the regulation alters current Federal law ensuring the rights of incompetent individuals with disabilities to receive food, water, and medical treatment. See, e.g., Child Abuse Amendments of 1984 (42 U.S.C. 5106a(b)(10), 5106g(10)); Rehabilitation Act of 1973, as amended (29 U.S.C 794); Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. 6042).

Sections 36.203(c) (1) and (2) are based on section 501(d) of the ADA. Section Sec.501(d) was designed to clarify that

nothing in the ADA requires individuals with disabilities to accept special accommodations and services for individuals with disabilities that may segregate them:

The Committee added this section (501(d)) to clarify that nothing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with disability. For example, a blind individual may choose not to avail himself or herself of the right to go to the front of a line, even if a particular public accommodation has chosen to offer such a modification of a policy for blind individuals. Or, a blind individual may choose to decline to participate in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibits at his or her own pace with the museum's recorded tour.

(Judiciary report at 71 - 72.) The Act is not to be construed to mean that an individual with disabilities must accept special accommodations and services for individuals with disabilities when that individual chooses to participate in the regular services already offered. Because medical treatment, including treatment for particular conditions, is not a special accommodation or service for individuals with disabilities under section 501(d), neither the Act nor this part provides affirmative authority to suspend such treatment. Section 501(d) is intended to clarify that the Act is not designed to foster discrimination through mandatory acceptance of special services when other alternatives are provided; this concern does not reach to the provision of medical treatment for the disabling condition itself.

Section 36.213 makes clear that the limitations contained in subpart C are to be read into subpart B. Thus, the integration requirement is subject to the various defenses contained in subpart C, such as safety, if eligibility criteria are at issue (Sec.36.301(b)), or fundamental alteration and undue burden, if the concern is provision of auxiliary aids (Sec.36.303(a)).

Section 36.204 Administrative Methods

Section 36.204 specifies that an individual or entity shall not, directly, or through contractual or other arrangements, utilize standards or criteria or methods of administration that have the effect of discriminating on the basis of disability or that perpetuate the discrimination of others who are subject to common administrative control. The preamble discussion of Sec.36.301 addresses eligibility criteria in detail.

Section 36.204 is derived from section 302(b)(1)(D) of the Americans with Disabilities Act, and it uses the same language used in the employment section of the ADA (section 102(b)(3)). Both sections incorporate a disparate impact standard to ensure the effectiveness of the legislative mandate to end discrimination. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in Alexander v. Choate, 469 U.S. 287 (1985). The Court in Choate explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted: "These statements would ring hollow if the resulting legislation

could not rectify the harms resulting from action that discriminated by effect as well as by design." Id at 297 (footnote omitted).

Of course, Sec.36.204 is subject to the various limitations contained in subpart C including, for example, necessity (Sec.36.301(a)), safety (Sec.36.301(b)), fundamental alteration (Sec.36.302(a)), readily achievable (Sec.36.304(a)), and undue burden (Sec.36.303(a)).

Section 36.205 Association

Section 36.205 implements section 302(b)(1)(E) of the Act, which provides that a public accommodation shall not exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association. This section is unchanged from the proposed rule.

The individuals covered under this section include any individuals who are discriminated against because of their known association with an individual with a disability. For example, it would be a violation of this part for a day care center to refuse admission to a child because his or her brother has HIV disease.

This protection is not limited to those who have a familial relationship with the individual who has a disability. If a place of public accommodation refuses admission to a person with cerebral palsy and his or her companions, the

companions have an independent right of action under the ADA and this section.

During the legislative process, the term "entity" was added to section 302(b)(1)(E) to clarify that the scope of the provision is intended to encompass not only persons who have a known association with a person with a disability, but also entities that provide services to or are otherwise associated with such individuals. This provision was intended to ensure that entities such as health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities. For example, it would be a violation of this section to terminate the lease of a entity operating an independent living center for persons with disabilities, or to seek to evict a health care provider because that individual or entity provides services to persons with mental impairments.

Section 36.206 Retaliation or Coercion

Section 36.206 implements section 503 of the ADA, which prohibits retaliation against any individual who exercises his or her rights under the Act. This section is unchanged from the proposed rule. Paragraph (a) of Sec.36.206 provides that no private entity or public entity shall discriminate against any individual because that individual has exercised his or her right to oppose any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

Paragraph (b) provides that no private entity or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise of his or her rights under this part or because that individual aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by the Act or this part.

Illustrations of practices prohibited by this section are contained in paragraph (c), which is modeled on a similar provision in the regulations issued by the Department of Housing and Urban Development to implement the Fair Housing Act (see 24 CFR 100.400(c)(l)). Prohibited actions may include:

(1) Coercing an individual to deny or limit the benefits, services, or advantages to which he or she is entitled under the Act or this part;

(2) Threatening, intimidating, or interfering with an individual who is seeking to obtain or use the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation;

(3) Intimidating or threatening any person because that person is assisting or encouraging an individual or group entitled to claim the rights granted or protected by the Act or this part to exercise those rights; or

(4) Retaliating against any person because that person has participated in any investigation or action to enforce the Act or this part.

This section protects not only individuals who allege a violation of the Act or this part, but also any individuals who support or assist them. This section applies to all investigations or proceedings initiated under the Act or this

part without regard to the ultimate resolution of the underlying allegations. Because this section prohibits any act of retaliation or coercion in response to an individual's effort to exercise rights established by the Act and this part (or to support the efforts of another individual), the section applies not only to public accommodations that are otherwise subject to this part, but also to individuals other than public accommodations or to public entities. For example, it would be a violation of the Act and this part for a private individual, e.g., a restaurant customer, to harass or intimidate an individual with a disability in an effort to prevent that individual from patronizing the restaurant. It would, likewise, be a violation of the Act and this part for a public entity to take adverse action against an employee who appeared as a witness on behalf of an individual who sought to enforce the Act.

Section 36.211 Maintenance of Accessible Features

Section 36.211 provides that a public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part. The Act requires that, to the maximum extent feasible, facilities must be accessible to, and usable by, individuals with disabilities. This section recognizes that it is not sufficient to provide features such as accessible routes, elevators, or ramps, if those features are not maintained in a manner that enables individuals with disabilities to use them. Inoperable elevators, locked accessible doors, or

"accessible" routes that are obstructed by furniture, filing cabinets, or potted plants are neither "accessible to" nor "usable by" individuals with disabilities.

Some commenters objected that this section appeared to establish an absolute requirement and suggested that language from the preamble be included in the text of the regulation. It is, of course, impossible to guarantee that mechanical devices will never fail to operate. Paragraph (b) of the final regulation provides that this section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs. This paragraph is intended to clarify that temporary obstructions or isolated instances of mechanical failure would not be considered violations of the Act or this part. However, allowing obstructions or "out of service" equipment to persist beyond a reasonable period of time would violate this part, as would repeated mechanical failures due to improper or inadequate maintenance. Failure of the public accommodation to ensure that accessible routes are properly maintained and free of obstructions, or failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access, would also violate this part.

Other commenters requested that this section be expanded to include specific requirements for inspection and maintenance of equipment, for training staff in the proper operation of equipment, and for maintenance of specific items. The Department believes that this section properly establishes the general requirement for maintaining access and that further, more detailed requirements are not necessary.

Section 36.213 Relationship of Subpart 8 to Subparts C and D

This section explains that subpart B sets forth the general principles of nondiscrimination applicable to all entities subject to this regulation, while subparts C and D provide guidance on the application of this part to specific situations. The specific provisions in subparts C and D, including the limitations on those provisions, control over the general provisions in circumstances where both specific and general provisions apply. Resort to the general provisions of subpart B is only appropriate where there are no applicable specific rules of guidance in subparts C or D. This interaction between the specific requirements and the general requirements operates with regard to contractual obligations as well.

One illustration of this principle is its application to the obligation of a public accommodation to provide access to services by removal of architectural barriers or by alternatives to barrier removal. The general requirement, established in subpart B by Sec.36.203, is that a public accommodation must provide its services to individuals with disabilities in the most integrated setting appropriate. This general requirement would appear to categorically prohibit "segregated" seating for persons in wheelchairs. Section 36.304, however, only requires removal of architectural barriers to the extent that removal is "readily achievable." If providing access to all areas of a restaurant, for example, would not be "readily achievable," a public accommodation may provide access to selected areas only. Also, Sec.36.305 provides that, where barrier removal is not readily achievable, a public accommodation may use alternative, readily achievable methods of making services available, such as curbside service or home delivery. Thus, in this

manner, the specific requirements of Sec..36.304 and 36.305 control over the general requirement of Sec.36.203.

Subpart C -- Specific Requirements

In general, subpart C implements the "specific prohibitions" that comprise section 302(b)(2) of the ADA. It also addresses the requirements of section 309 of the ADA regarding examinations and courses.

Section 36.301 Eligibility Criteria

Section 36.301 of the rule prohibits the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, and accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered. This prohibition is based on section 302(b)(2)(A)(i) of the ADA.

It would violate this section to establish exclusive or segregative eligibility criteria that would bar, for example, all persons who are deaf from playing on a golf course or all individuals with cerebral palsy from attending a movie theater, or limit the seating of individuals with Down's syndrome to only particular areas of a restaurant. The wishes, tastes, or preferences of other customers may not be asserted to justify criteria that would exclude or segregate individuals with disabilities.

Section 36.301 also prohibits attempts by a public accommodation to unnecessarily identify the existence of a disability; for example, it would be a violation of this section for a retail store to require an individual to state on a credit application whether the applicant has epilepsy, mental illness, or any other disability, or to inquire unnecessarily whether an individual has HIV disease.

Section 36.301 also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. For example, public accommodations may not require that an individual with a disability be accompanied by an attendant. As provided by Sec.36.306, however, a public accommodation is not required to provide services of a personal nature including assistance in toileting, eating, or dressing.

Paragraph (c) of Sec.36.301 provides that public accommodations may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids and services, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, and procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

Other commenters sought clarification as to whether Sec.36.301(c) prohibits professionals from charging for the additional time that it may take in certain cases to provide services to an individual with disabilities. The Department

does not intend Sec.36.301(c) to prohibit professionals who bill on the basis of time from charging individuals with disabilities on that basis. However, fees may not be charged for the provision of auxiliary aids and services, barrier removal, alternatives to barrier removal, reasonable modifications in policies, practices, and procedures, or any other measures necessary to ensure compliance with the ADA.

Other commenters inquired as to whether day care centers may charge for extra services provided to individuals with disabilities. As stated above, Sec.36.302(c) is intended only to prohibit charges for measures necessary to achieve compliance with the ADA.

Another commenter asserted that charges may be assessed for home delivery provided as an alternative to barrier removal under Sec.36.305, when home delivery is provided to all customers for a fee. Charges for home delivery are permissible if home delivery is not considered an alternative to barrier removal. If the public accommodation offers an alternative, such as curb, carry-out, or sidewalk service for which no surcharge is assessed, then it may charge for home delivery in accordance with its standard pricing for home delivery.

In addition, Sec.36.301 prohibits the imposition of criteria that "tend to" screen out an individual with a disability. This concept, which is derived from current regulations under section 504 (see, e.g., 45 CFR 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, indirectly prevent or limit their ability to participate. For

example, requiring presentation of a driver's license as the sole means of identification for purposes of paying by check would violate this section in situations where, for example, individuals with severe vision impairments or developmental disabilities or epilepsy are ineligible to receive a driver's license and the use of an alternative means of identification, such as another photo I.D. or credit card, is feasible.

A public accommodation may, however, impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities, if the criteria are necessary for the safe operation of the public accommodation. Examples of safety qualifications that would be justifiable in appropriate circumstances would include height requirements for certain amusement park rides or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency. Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

Section 36.302 Modifications in Policies, Practices, or Procedures

Section 36.302 of the rule prohibits the failure to make reasonable modifications in policies, practices, and procedures when such modifications may be necessary to afford any goods, services, facilities, privileges, advantages, or accommodations, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges,

advantages, or accommodations. This prohibition is based on section 302(b)(2)(A)(ii) of the ADA.

For example, a parking facility would be required to modify a rule barring all vans or all vans with raised roofs, if an individual who uses a wheelchair-accessible van wishes to park in that facility, and if overhead structures are high enough to accommodate the height of the van. A department store may need to modify a policy of only permitting one person at a time in a dressing room, if an individual with mental retardation needs and requests assistance in dressing from a companion. Public accommodations may need to revise operational policies to ensure that services are available to individuals with disabilities. For instance, a hotel may need to adopt a policy of keeping an accessible room unoccupied until an individual with a disability arrives at the hotel, assuming the individual has properly reserved the room.

One example of application of this principle is specifically included in a new Sec.36.302(d) on check-out aisles. That paragraph provides that a store with check-out aisles must ensure that an adequate number of accessible check-out aisles is kept open during store hours, or must otherwise modify its policies and practices, in order to ensure that an equivalent level of convenient service is provided to individuals with disabilities as is provided to others. For example, if only one check-out aisle is accessible, and it is generally used for express service, one way of providing equivalent service is to allow persons with mobility impairments to make all of their purchases at that aisle. This principle also applies with respect to other accessible elements and services. For example, a particular bank may

be in compliance with the accessibility guidelines for new construction incorporated in appendix A with respect to automated teller machines (ATM) at a new branch office by providing one accessible walk-up machine at that location, even though an adjacent walk-up ATM is not accessible and the drive-up ATM is not accessible. However, the bank would be in violation of this section if the accessible ATM was located in a lobby that was locked during evening hours while the drive-up ATM was available to customers without disabilities during those same hours. The bank would need to ensure that the accessible ATM was available to customers during the hours that any of the other ATM's was available.

A number of commenters inquired as to the relationship between this section and Sec.36.307, "Accessible or special goods." Under Sec.36.307, a public accommodation is not required to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities. The rule enunciated in Sec.36.307 is consistent with the "fundamental alteration" defense to the reasonable modifications requirement of Sec.36.302. Therefore, Sec.36.302 would not require the inventory of goods provided by a public accommodation to be altered to include goods with accessibility features. For example, Sec.36.302 would not require a bookstore to stock Brailled books or order Brailled books, if it does not do so in the normal course of its business.

Section 36.302(c)(1) requires that a public accommodation modify its policies, practices, or procedures to permit the use

of a service animal by an individual with a disability in any area open to the general public. The term "service animal" is defined in Sec.36.104 to include guide dogs, signal dogs, or any other animal individually trained to provide assistance to an individual with a disability.

A number of commenters pointed to the difficulty of making the distinction required by the proposed rule between areas open to the general public and those that are not. The ambiguity and uncertainty surrounding these provisions has led the Department to adopt a single standard for all public accommodations.

Section 36.302(c)(1) of the final rule now provides that "[g]enerally, a public accommodation shall modify policies, practices, and procedures to permit the use of a service animal by an individual with a disability." This formulation reflects the general intent of Congress that public accommodations take the necessary steps to accommodate service animals and to ensure that individuals with disabilities are not separated from their service animals. It is intended that the broadest feasible access be provided to service animals in all places of public accommodation, including movie theaters, restaurants, hotels, retail stores, hospitals, and nursing homes (see Education and Labor report at 106; Judiciary report at 59). The section also acknowledges, however, that, in rare circumstances, accommodation of service animals may not be required because a fundamental alteration would result in the nature of the goods, services, facilities, privileges, or accommodations offered or provided, or the safe operation of the public accommodation would be jeopardized.

As specified in Sec.36.302(c)(2), the rule does not require a public accommodation to supervise or care for any service animal. If a service animal must be separated from an individual with a disability in order to avoid a fundamental alteration or a threat to safety, it is the responsibility of the individual with the disability to arrange for the care and supervision of the animal during the period of separation.

Section 36.303 Auxiliary Aids and Services.

Section 36.303 of the final rule requires a public accommodation to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, facilities, advantages, or accommodations being offered or would result in an undue burden. This requirement is based on section 302(b)(2)(A)(iii) of the ADA.

Implicit in this duty to provide auxiliary aids and services is the underlying obligation of a public accommodation to communicate effectively with its customers, clients, patients, or participants who have disabilities affecting hearing, vision, or speech. To give emphasis to this underlying obligation, Sec.36.303(c) of the rule incorporates language derived from section 504 regulations for federally conducted programs (see e.g., 28 CFR 39.160(a)) that requires that appropriate auxiliary aids and services be furnished to ensure that communication with persons with disabilities is as effective as communication with others.

Auxiliary aids and services include a wide range of services and devices for ensuring effective communication. Use of the most advanced technology is not required so long as effective communication is ensured. The Department's proposed Sec.36.303(b) provided a list of examples of auxiliary aids and services that was taken from the definition of auxiliary aids and services in section 3(1) of the ADA and was supplemented by examples from regulations implementing section 504 in federally conducted programs (see e.g., 28 CFR 39.103). A substantial number of commenters suggested that additional examples be added to this list. The Department has added several items to this list but wishes to clarify that the list is not an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services. It is not possible to provide an exhaustive list, and such an attempt would omit new devices that will become available with emerging technology.

The Department wishes to emphasize that public accommodations must take steps necessary to ensure that an individual with a disability will not be excluded, denied services, segregated or otherwise treated differently from other individuals because of the use of inappropriate or ineffective auxiliary aids.

As provided in Sec.36.303(f), a public accommodation is not required to provide any particular aid or service that would result either in a fundamental alteration in the nature of the goods, services, facilities, privileges, advantages, or accommodations offered or in an undue burden. Both of these statutory limitations are derived from existing

regulations and caselaw under section 504 and are to be applied on a case-by-case basis (see, e.g., 28 CFR 39.160(d) and Southeastern Community College v. Davis, 442 U.S. 397 (1979)). Congress intended that "undue burden" under Sec.36.303 and "undue hardship," which is used in the employment provisions of title I of the ADA, should be determined on a case-by-case basis under the same standards and in light of the same factors (Judiciary report at 59). The rule, therefore, in accordance with the definition of undue hardship in section 101(10) of the ADA, defines undue burden as "significant difficulty or expense" (see Sec..36.104 and 36.303(a)) and requires that undue burden be determined in light of the factors listed in the definition in 36.104.

Consistent with regulations implementing section 504 in federally conducted programs (see, e.g., 28 CFR 39.160(d)), Sec.36.303(f) provides that the fact that the provision of a particular auxiliary aid or service would result in an undue burden does not relieve a public accommodation from the duty to furnish an alternative auxiliary aid or service, if available, that would not result in such a burden.

Section 36.303(g) of the proposed rule has been deleted from this section and included in a new Sec.36.306. That new section continues to make clear that the auxiliary aids requirement does not mandate the provision of individually prescribed devices, such as prescription eyeglasses or hearing aids.

The costs of compliance with the requirements of this section may not be financed by surcharges limited to

particular individuals with disabilities or any group of individuals with disabilities (Sec.36.301(c)).

Section 36.304 Removal of Barriers

Section 36.304 requires the removal of architectural barriers and communication barriers that are structural in nature in existing facilities, where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense. This requirement is based on section 302(b)(2)(A)(iv) of the ADA.

A number of commenters interpreted the phrase "communication barriers that are structural in nature" broadly to encompass ´the provision of communications devices such as TDD's, telephone handset amplifiers, assistive listening devices, and digital check-out displays. The statute, however, as read by the Department, limits the application of the phrase "communications barriers that are structural in nature" to those barriers that are an integral part of the physical structure of a facility. In addition to the communications barriers posed by permanent signage and alarm systems noted by Congress (see Education and Labor report at 110), the Department would also include among the communications barriers covered by Sec.36.304 the failure to provide adequate sound buffers, and the presence of physical partitions that hamper the passage of sound waves between employees and customers. Given that Sec.36.304's proper focus is on the removal of physical barriers, the Department believes that the obligation to provide communications equipment and devices such as TDD's, telephone handset amplifiers, assistive listening devices, and digital check-out displays is more appropriately determined

by the requirements for auxiliary aids and services under Sec.36.303 (see Education and Labor report at 107 - 108). The obligation to remove communications barriers that are structural in nature under Sec.36.304, of course, is independent of any obligation to provide auxiliary aids and services under Sec.36.303.

The statutory provision also requires the readily achievable removal of certain barriers in existing vehicles and rail passenger cars. This transportation requirement is not included in Sec.36.304, but rather in Sec.36.310(b) of the rule.

In striking a balance between guaranteeing access to individuals with disabilities and recognizing the legitimate cost concerns of businesses and other private entities, the ADA establishes different standards for existing facilities and new construction. In existing facilities, which are the subject of Sec.36.304, where retrofitting may prove costly, a less rigorous degree of accessibility is required than in the case of new construction and alterations (see Sec..36.401 - 36.406) where accessibility can be more conveniently and economically incorporated in the initial stages of design and construction.

The requirement to remove architectural barriers includes the removal of physical barriers of any kind. For example, Sec.36.304 requires the removal, when readily achievable, of barriers caused by the location of temporary or movable structures, such as furniture, equipment, and display racks. In order to provide access to individuals who use wheelchairs, for example, restaurants may need to rearrange

tables and chairs, and department stores may need to reconfigure display racks and shelves. As stated in Sec.36.304(f), such actions are not readily achievable to the extent that they would result in a significant loss of selling or serving space. If the widening of all aisles in selling or serving areas is not readily achievable, then selected widening should be undertaken to maximize the amount of merchandise or the number of tables accessible to individuals who use wheelchairs. Access to goods and services provided in any remaining inaccessible areas must be made available through alternative methods to barrier removal, as required by Sec.36.305.

Because the purpose of title III of the ADA is to ensure that public accommodations are accessible to their customers, clients, or patrons (as opposed to their employees, who are the focus of title I), the obligation to remove barriers under Sec.36.304 does not extend to areas of a facility that are used exclusively as employee work areas.

Section 36.304(b) provides a wide-ranging list of the types of modest measures that may be taken to remove barriers and that are likely to be readily achievable. The list includes examples of measures, such as adding raised letter markings on elevator control buttons and installing flashing alarm lights, that would be used to remove communications barriers that are structural in nature. It is not an exhaustive list, but merely an illustrative one. Moreover, the inclusion of a measure on this list does not mean that it is readily achievable in all cases. Whether or not any of these measures is readily achievable is to be determined on a case-by-case basis in light of the particular circumstances presented and the factors listed in the definition of readily

achievable (Sec.36.104).

Section 36.304(f)(1) of the proposed rule, which stated that "barrier removal is not readily achievable if it would result in significant loss of profit or significant loss of efficiency of operation," has been deleted from the final rule. Many commenters objected to this provision because it impermissibly introduced the notion of profit into a statutory standard that did not include it. Concern was expressed that, in order for an action not to be considered readily achievable, a public accommodation would inappropriately have to show, for example, not only that the action could not be done without "much difficulty or expense", but that a significant loss of profit would result as well. In addition, some commenters asserted use of the word "significant," which is used in the definition of undue hardship under title I (the standard for interpreting the meaning of undue burden as a defense to title III's auxiliary aids requirements) (see Sec..36.104, 36.303(f)), blurs the fact that the readily achievable standard requires a lower level of effort on the part of a public accommodation than does the undue burden standard.

The obligation to engage in readily achievable barrier removal is a continuing one. Over time, barrier removal that initially was not readily achievable may later be required because of changed circumstances. Many commenters expressed support for the Department's position that the obligation to comply with Sec.36.304 is continuing in nature. Some urged that the rule require public accommodations to assess their compliance on at least an annual basis in light of changes in resources and other factors that would be relevant to determining what barrier removal measures would

be readily achievable.

Although the obligation to engage in readily achievable barrier removal is clearly a continuing duty, the Department has declined to establish any independent requirement for an annual assessment or self-evaluation. It is best left to the public accommodations subject to Sec.36.304 to establish policies to assess compliance that are appropriate to the particular circumstances faced by the wide range of public accommodations covered by the ADA. However, even in the absence of an explicit regulatory requirement for periodic self-evaluations, the Department still urges public accommodations to establish procedures for an ongoing assessment of their compliance with the ADA's barrier removal requirements. The Department recommends that this process include appropriate consultation with individuals with disabilities or organizations representing them. A serious effort at self-assessment and consultation can diminish the threat of litigation and save resources by identifying the most efficient means of providing required access.

Section 36.304(c)(1) places the highest priority on measures that will enable individuals with disabilities to physically enter a place of public accommodation. This priority on "getting through the door" recognizes that providing actual physical access to a facility from public sidewalks, public transportation, or parking is generally preferable to any alternative arrangements in terms of both business efficiency and the dignity of individuals with disabilities.

The next priority, which is established in Sec.36.304(c)(2),

is for measures that provide access to those areas of a place of public accommodation where goods and services are made available to the public. For example, in a hardware store, to the extent that it is readily achievable to do so, individuals with disabilities should be given access not only to assistance at the front desk, but also access, like that available to other customers, to the retail display areas of the store.

The Department agrees with those commenters who argued that access to the areas where goods and services are provided is generally more important than the provision of restrooms. Therefore, the final rule reverses priorities two and three of the proposed rule in order to give lower priority to accessible restrooms. Consequently, the third priority in the final rule (Sec.36.304(c)(3)) is for measures to provide access to restroom facilities and the last priority is placed on any remaining measures required to remove barriers.

Section 36.304(d) requires that measures taken to remove barriers under Sec.36.304 be subject to subpart D's requirements for alterations (except for the path of travel requirements in Sec.36.403). It only permits deviations from the subpart D requirements when compliance with those requirements is not readily achievable. In such cases, Sec.36.304(d) permits measures to be taken that do not fully comply with the subpart D requirements, so long as the measures do not pose a significant risk to the health or safety of individuals with disabilities or others.

This approach represents a change from the proposed rule which stated that "readily achievable" measures taken solely to remove barriers under Sec.36.304 are exempt from the alterations requirements of subpart D. The intent of the

proposed rule was to maximize the flexibility of public accommodations in undertaking barrier removal by allowing deviations from the technical standards of subpart D. It was thought that allowing slight deviations would provide access and release additional resources for expanding the amount of barrier removal that could be obtained under the readily achievable standard.

The Department in the final rule has adopted the view of many commenters that (1) public accommodations should in the first instance be required to comply with the subpart D standards for alterations where it is readily achievable to do so and (2) safe, readily achievable measures must be taken when compliance with the subpart D standards is not readily achievable. Reference to the subpart D standards in this manner will promote certainty and good design at the same time that permitting slight deviations will expand the amount of barrier removal that may be achieved under Sec.36.304.

Because of the inconvenience to individuals with disabilities and the safety problems involved in the use of portable ramps, Sec.36.304(e) permits the use of a portable ramp to comply with Sec.36.304(a) only when installation of a permanent ramp is not readily achievable. In order to promote safety, Sec.36.304(e) requires that due consideration be given to the incorporation of features such as nonslip surfaces, railings, anchoring, and strength of materials in any portable ramp that is used.

Section 36.305 Alternatives to Barrier Removal

Section 36.305 specifies that where a public accommodation can demonstrate that removal of a barrier is not readily achievable, the public accommodation must make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods, if such methods are readily achievable. This requirement is based on section 302(b)(2)(A)(v) of the ADA.

For example, if it is not readily achievable for a retail store to raise, lower, or remove shelves or to rearrange display racks to provide accessible aisles, the store must, if readily achievable, provide a clerk or take other alternative measures to retrieve inaccessible merchandise. Similarly, if it is not readily achievable to ramp a long flight of stairs leading to the front door of a restaurant or a pharmacy, the restaurant or the pharmacy must take alternative measures, if readily achievable, such as providing curb service or home delivery. If, within a restaurant, it is not readily achievable to remove physical barriers to a certain section of a restaurant, the restaurant must, where it is readily achievable to do so, offer the same menu in an accessible area of the restaurant.

Where alternative methods are used to provide access, a public accommodation may not charge an individual with a disability for the costs associated with the alternative method (see Sec.36.301(c)). Further analysis of the issue of charging for alternative measures may be found in the preamble discussion of Sec.36.301(c).

In some circumstances, because of security considerations, some alternative methods may not be readily achievable. The rule does not require a cashier to leave his or her post to retrieve items for individuals with disabilities, if there are no other employees on duty.

Section 36.305(c) of the proposed rule has been deleted and the requirements have been included in a new Sec.36.306. That section makes clear that the alternative methods requirement does not mandate the provision of personal devices, such as wheelchairs, or services of a personal nature.

Section 36.306 Personal Devices and Services

The final rule includes a new Sec.36.306, entitled "Personal devices and services." Section 36.306 of the proposed rule, "Readily achievable and undue burden: Factors to be considered," was deleted for the reasons described in the preamble discussion of the definition of the term "readily achievable" in Sec.36.104. In place of Sec..36.303(g) and 36.305(c) of the proposed rule, which addressed the issue of personal devices and services in the contexts of auxiliary aids and alternatives to barrier removal, Sec.36.306 provides a general statement that the regulation does not require the provision of personal devices and services. This section states that a public accommodation is not required to provide its customers, clients, or participants with personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; or services of a personal nature including assistance in eating, toileting, or dressing.

This statement serves as a limitation on all the requirements of the regulation. The personal devices and services limitation was intended to have general application in the proposed rule in all contexts where it was relevant. The final rule, therefore, clarifies, this point by including a general provision that will explicitly apply not just to auxiliary aids and services and alternatives to barrier removal, but across-the-board to include such relevant areas as modifications in policies, practices, and procedures (Sec.36.302) and examinations and courses (Sec.36.309), as well.

The Department wishes to clarify that measures taken as alternatives to barrier removal, such as retrieving items from shelves or providing curb service or home delivery, are not to be considered personal services. Similarly, minimal actions that may be required as modifications in policies, practices, or procedures under Sec.36.302, such as a waiter's removing the cover from a customer's straw, a kitchen's cutting up food into smaller pieces, or a bank's filling out a deposit slip, are not services of a personal nature within the meaning of Sec.36.306. (Of course, such modifications may be required under Sec.36.302 only if they are "reasonable.") Similarly, this section does not preclude the short-term loan of personal receivers that are part of an assistive listening system.

Of course, if personal services are customarily provided to the customers or clients of a public accommodation, e.g., in a hospital or senior citizen center, then these personal services should also be provided to persons with disabilities using

the public accommodation.

Section 36.310 Transportation Provided by Public Accommodations

Section 36.310 contains specific provisions relating to public accommodations that provide transportation to their clients or customers. This section has been substantially revised in order to coordinate the requirements of this section with the requirements applicable to these transportation systems that will be contained in the regulations issued by the Secretary of Transportation pursuant to section 306 of the ADA, to be codified at 49 CFR part 37. The Department notes that, although the responsibility for issuing regulations applicable to transportation systems operated by public accommodations is divided between this Department and the Department of Transportation, enforcement authority is assigned only to the Department of Justice.

The Department received relatively few comments on this section of the proposed rule. Most of the comments addressed issues that are not specifically addressed in this part, such as the standards for accessible vehicles and the procedure for determining whether equivalent service is provided. Those standards will be contained in the regulation issued by the Department of Transportation. Other commenters raised questions about the types of transportation that will be subject to this section. In response to these inquiries, the Department has revised the list of examples contained in the regulation.

Paragraph (a)(1) states the general rule that covered public accommodations are subject to all of the specific provisions of subparts B, C, and D, except as provided in Sec.36.310. Examples of operations covered by the requirements are listed in paragraph (a)(2). The stated examples include hotel and motel airport shuttle services, customer shuttle bus services operated by private companies and shopping centers, student transportation, and shuttle operations of recreational facilities such as stadiums, zoos, amusement parks, and ski resorts. This brief list is not exhaustive. The section applies to any fixed route or demand responsive transportation system operated by a public accommodation for the benefit of its clients or customers. The section does not apply to transportation services provided only to employees. Employee transportation will be subject to the regulations issued by the Equal Employment Opportunity Commission to implement title I of the Act. However, if employees and customers or clients are served by the same transportation system, the provisions of this section will apply.

Paragraph (b) specifically provides that a public accommodation shall remove transportation barriers in existing vehicles to the extent that it is readily achievable to do so, but that the installation of hydraulic or other lifts is not required.

Paragraph (c) provides that public accommodations subject to this section shall comply with the requirements for transportation vehicles and systems contained in the regulations issued by the Secretary of Transportation.

Subpart D -- New Construction and Alterations

Subpart D implements section 303 of the Act, which requires that newly constructed or altered places of public accommodation or commercial facilities be readily accessible to and usable by individuals with disabilities. This requirement contemplates a high degree of convenient access. It is intended to ensure that patrons and employees of places of public accommodation and employees of commercial facilities are able to get to, enter, and use the facility.

Potential patrons of places of public accommodation, such as retail establishments, should be able to get to a store, get into the store, and get to the areas where goods are being provided. Employees should have the same types of access, although those individuals require access to and around the employment area as well as to the area in which goods and services are provided.

The ADA is geared to the future -- its goal being that, over time, access will be the rule, rather than the exception. Thus, the Act only requires modest expenditures, of the type addressed in Sec.36.304 of this part, to provide access to existing facilities not otherwise being altered, but requires all new construction and alterations to be accessible.

The Act does not require new construction or alterations; it simply requires that, when a public accommodation or other private entity undertakes the construction or alteration of a facility subject to the Act, the newly constructed or altered facility must be made accessible. This subpart establishes the requirements for new construction and alterations.

As explained under the discussion of the definition of "facility," Sec.36.104, pending development of specific requirements, the Department will not apply this subpart to places of public accommodation located in mobile units, boats, or other conveyances.

Any sales or rental establishment of the type that is included in paragraph (5) of the definition of "place of public accommodation" (for example, a bakery, grocery store, clothing store, or hardware store) is considered a sales or rental establishment for purposes of this definition; the other types of public accommodations (e.g., restaurants, laundromats, banks, travel services, health spas) are not.

Section 36.402 Alterations

Sections 36.402 - 36.405 implement section 303(a)(2) of the Act, which requires that alterations to existing facilities be made in a way that ensures that the altered portion is readily accessible to and usable by individuals with disabilities. This part does not require alterations; it simply provides that when alterations are undertaken, they must be made in a manner that provides access.

Section 36.402(a)(1) provides that any alteration to a place of public accommodation or a commercial facility, after January 26, 1992, shall be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The proposed rule provided that an alteration would be

deemed to be undertaken after January 26, 1992, if the physical alteration of the property is in progress after that date. Commenters pointed out that this provision would, in some cases, produce an unjust result by requiring the redesign or retrofitting of projects initiated before this part established the ADA accessibility standards. The Department agrees that the proposed rule would, in some instances, unfairly penalize projects that were substantially completed before the effective date. Therefore, paragraph (a)(2) has been revised to specify that an alteration will be deemed to be undertaken after January 26, 1992, if the physical alteration of the property begins after that date. As a matter of interpretation, the Department will construe this provision to apply to alterations that require a permit from a State, County or local government, if physical alterations pursuant to the terms of the permit begin after January 26, 1992. The Department recognizes that this application of the effective date may require redesign of some facilities that were planned prior to the publication of this part, but no retrofitting will be required of facilities on which the physical alterations were initiated prior to the effective date of the Act. Of course, nothing in this section in any way alters the obligation of any facility to remove architectural barriers in existing facilities to the extent that such barrier removal is readily achievable.

Paragraph (b) provides that, for the purposes of this part, an "alteration" is a change to a place of public accommodation or a commercial facility that affects or could affect the usability of the building or facility or any part thereof. One commenter suggested that the concept of usability should apply only to those changes that affect access by persons with disabilities. The Department remains convinced that the

Act requires the concept of "usability" to be read broadly to include any change that affects the usability of the facility, not simply changes that relate directly to access by individuals with disabilities.

Therefore, in this final rule paragraph (b)(1) has been revised to include the major provisions of paragraphs (b)(1) and (b)(2) of the proposed rule. The examples in the proposed rule have been deleted. Paragraph (b)(1) now provides that alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical and electrical systems are not alterations unless they affect the usability of building or facility.

Paragraph (b)(2) of this final rule was added to clarify the scope of the alterations requirement. Paragraph (b)(2) provides that if existing elements, spaces, or common areas are altered, then each such altered element, space, or area shall comply with the applicable provisions of appendix A (ADAAG). As provided in Sec.36.403, if an altered space or area is an area of the facility that contains a primary function, then the requirements of that section apply.

Therefore, when an entity undertakes a minor alteration to a place of public accommodation or commercial facility, such as moving an electrical outlet, the new outlet must be installed in compliance with ADAAG. (Alteration of the

elements listed in Sec.36.403(c)(2) cannot trigger a path of travel obligation.) If the alteration is to an area, such as an employee lounge or locker room, that is not an area of the facility that contains a primary function, that area must comply with ADAAG. It is only when an alteration affects access to or usability of an area containing a primary function, as opposed to other areas or the elements listed in Sec.36.403(c)(2), that the path of travel to the altered area must be made accessible.

The Department received relatively few comments on paragraph (c), which explains the statutory phrase "to the maximum extent feasible." Some commenters suggested that the regulation should specify that cost is a factor in determining whether it is feasible to make an altered area accessible. The legislative history of the ADA indicates that the concept of feasibility only reaches the question of whether it is possible to make the alteration accessible in compliance with this part. Costs are to be considered only when an alteration to an area containing a primary function triggers an additional requirement to make the path of travel to the altered area accessible.

Section 36.402(c) is, therefore, essentially unchanged from the proposed rule. At the recommendation of a commenter, the Department has inserted the word "virtually" to modify "impossible" to conform to the language of the legislative history. It explains that the phrase "to the maximum extent feasible" as used in this section applies to the occasional case where the nature of an existing facility makes it virtually impossible to comply fully with applicable accessibility standards through a planned alteration. In the occasional cases in which full compliance is impossible,

alterations shall provide the maximum physical accessibility feasible. Any features of the facility that are being altered shall be made accessible unless it is technically infeasible to do so. If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would not be feasible, the facility shall be made accessible to persons with other types of disabilities (e.g., those who use crutches or who have impaired vision or hearing, or those who have other types of impairments).

Section 36.403 Alterations: Path of Travel

Section 36.403 implements the statutory requirement that any alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area, and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration. Paragraph (a) restates this statutory requirement.

Paragraph (b) defines a "primary function" as a major activity for which the facility is intended. This paragraph is unchanged from the proposed rule. Areas that contain a primary function include, but are not limited to, the customer services lobby of a bank, the dining area of a cafeteria, the meeting rooms in a conference center, as well as offices and all other work areas in which the activities of the public accommodation or other private entities using the

facility are carried out. The concept of "areas containing a primary function" is analogous to the concept of "functional spaces" in Sec.3.5 of the existing Uniform Federal Accessibility Standards, which defines "functional spaces" as "[t]he rooms and spaces in a building or facility that house the major activities for which the building or facility is intended."

Paragraph (b) provides that areas such as mechanical rooms, boiler rooms, supply storage rooms, employee lounges and locker rooms, janitorial closets, entrances, corridors, and restrooms are not areas containing a primary function. There may be exceptions to this general rule. For example, the availability of public restrooms at a place of public accommodation at a roadside rest stop may be a major factor affecting customers' decisions to patronize the public accommodation. In that case, a restroom would be considered to be an "area containing a primary function" of the facility.

Most of the commenters who addressed this issue supported the approach taken by the Department; but a few commenters suggested that areas not open to the general public or those used exclusively by employees should be excluded from the definition of primary function. The preamble to the proposed rule noted that the Department considered an alternative approach to the definition of "primary function," under which a primary function of a commercial facility would be defined as a major activity for which the facility was intended, while a primary function of a place of public accommodation would be defined as an activity which involves providing significant goods, services, facilities, privileges, advantages, or accommodations. However, the

Department concluded that, although portions of the legislative history of the ADA support this alternative, the better view is that the language now contained in Sec.36.403(b) most accurately reflects congressional intent. No commenter made a persuasive argument that the Department's interpretation of the legislative history is incorrect.

When the ADA was introduced, the requirement to make alterations accessible was included in section 302 of the Act, which identifies the practices that constitute discrimination by a public accommodation. Because section 302 applies only to the operation of a place of public accommodation, the alterations requirement was intended only to provide access to clients and customers of a public accommodation. It was anticipated that access would be provided to employees with disabilities under the "reasonable accommodation" requirements of title I. However, during its consideration of the ADA, the House Judiciary Committee amended the bill to move the alterations provision from section 302 to section 303, which applies to commercial facilities as well as public accommodations. The Committee report accompanying the bill explains that:

New construction and alterations of both public accommodations and commercial facilities must be made readily accessible to and usable by individuals with disabilities * * *. Essentially, [this requirement] is designed to ensure that patrons and employees of public accommodations and commercial facilities are able to get to, enter and use the facility * * *. The rationale for making new construction accessible applies with equal force to

alterations.

Judiciary report at 62 - 63 (emphasis added).

The ADA, as enacted, contains the language of section 303 as it was reported out of the Judiciary Committee. Therefore, the Department has concluded that the concept of "primary function" should be applied in the same manner to places of public accommodation and to commercial facilities, thereby including employee work areas in places of public accommodation within the scope of this section.

Paragraph (c) provides examples of alterations that affect the usability of or access to an area containing a primary function. The examples include: Remodeling a merchandise display area or employee work areas in a department store; installing a new floor surface to replace an inaccessible surface in the customer service area or employee work areas of a bank; redesigning the assembly line area of a factory; and installing a computer center in an accounting firm. This list is illustrative, not exhaustive. Any change that affects the usability of or access to an area containing a primary function triggers the statutory obligation to make the path of travel to the altered area accessible.

When the proposed rule was drafted, the Department believed that the rule made it clear that the ADA would require alterations to the path of travel only when such alterations are not disproportionate to the alteration to the primary function area. However, the comments that the Department received indicated that many commenters believe that even minor alterations to individual elements would

require additional alterations to the path of travel. To address the concern of these commenters, a new paragraph (c)(2) has been added to the final rule to provide that alterations to such elements as windows, hardware, controls (e.g. light switches or thermostats), electrical outlets, or signage will not be deemed to be alterations that affect the usability of or access to an area containing a primary function. Of course, each element that is altered must comply with ADAAG (appendix A) . The cost of alterations to individual elements would be included in the overall cost of an alteration for purposes of determining disproportionality and would be counted when determining the aggregate cost of a series of small alterations in accordance with Sec.36.401(h) if the area is altered in a manner that affects access to or usability of an area containing a primary function.

Paragraph (d) concerns the respective obligations of landlords and tenants in the cases of alterations that trigger the path of travel requirement under Sec.36.403. This paragraph was contained in the landlord/tenant section of the proposed rule, Sec.36.201(b). If a tenant is making alterations upon its premises pursuant to terms of a lease that grant it the authority to do so (even if they constitute alterations that trigger the path of travel requirement), and the landlord is not making alterations to other parts of the facility, then the alterations by the tenant on its own premises do not trigger a path of travel obligation upon the landlord in areas of the facility under the landlord's authority that are not otherwise being altered. The legislative history makes clear that the path of travel requirement applies only to the entity that is already making the alteration, and thus the Department has not changed the final rule despite

numerous comments suggesting that the tenant be required to provide a path of travel.

Paragraph (e) defines a "path of travel" as a continuous, unobstructed way of pedestrian passage by means of which an altered area may be approached, entered, and exited; and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility. This concept of an accessible path of travel is analogous to the concepts of "accessible route" and "circulation path" contained in section 3.5 of the current UFAS. Some commenters suggested that this paragraph should address emergency egress. The Department disagrees. "Path of travel" as it is used in this section is a term of art under the ADA that relates only to the obligation of the public accommodation or commercial facility to provide additional accessible elements when an area containing a primary function is altered. The Department recognizes that emergency egress is an important issue, but believes that it is appropriately addressed in ADAAG (appendix A), not in this paragraph. Furthermore, ADAAG does not require changes to emergency egress areas in alterations.

Paragraph (e)(2) is drawn from section 3.5 of UFAS. It provides that an accessible path of travel may consist of walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of such elements. Paragraph (e)(3) provides that, for the purposes of this part, the term "path of travel" also includes the restrooms, telephones, and drinking fountains serving an altered area.

Although the Act establishes an expectation that an accessible path of travel should generally be included when alterations are made to an area containing a primary function, Congress recognized that, in some circumstances, providing an accessible path of travel to an altered area may be sufficiently burdensome in comparison to the alteration being undertaken to the area containing a primary function as to render this requirement unreasonable. Therefore, Congress provided, in section 303(a)(2) of the Act, that alterations to the path of travel that are disproportionate in cost and scope to the overall alteration are not required.

The Act requires the Attorney General to determine at what point the cost of providing an accessible path of travel becomes disproportionate. The proposed rule provided three options for making this determination.

Two committees of Congress specifically addressed this issue: the House Committee on Education and Labor and the House Committee on the Judiciary. The reports issued by each committee suggested that accessibility alterations to a path of travel might be "disproportionate" if they exceed 30% of the alteration costs (Education and Labor report at 113; Judiciary report at 64). Because the Department believed that smaller percentage rates might be appropriate, the proposed rule sought comments on three options: 10%, 20%, or 30%.

The Department received a significant number of comments on this section. Commenters representing individuals with disabilities generally supported the use of 30% (or more);

commenters representing covered entities supported a figure of 10% (or less). The Department believes that alterations made to provide an accessible path of travel to the altered area should be deemed disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area. This approach appropriately reflects the intent of Congress to provide access for individuals with disabilities without causing economic hardship for the covered public accommodations and commercial facilities.

The Department has determined that the basis for this cost calculation shall be the cost of the alterations to the area containing the primary function. This approach will enable the public accommodation or other private entity that is making the alteration to calculate its obligation as a percentage of a clearly ascertainable base cost, rather than as a percentage of the "total" cost, an amount that will change as accessibility alterations to the path of travel are made.

Paragraph (f)(2) (paragraph (e)(2) in the proposed rule) is unchanged. It provides examples of costs that may be counted as expenditures required to provide an accessible path of travel. They include:

- Costs associated with providing an accessible entrance and an accessible route to the altered area, for example, the cost of widening doorways or installing ramps;

- Costs associated with making restrooms accessible, such as installing grab bars, enlarging toilet stalls, insulating pipes, or installing accessible faucet controls;

- Costs associated with providing accessible telephones, such as relocating telephones to an accessible height, installing amplification devices, or installing telecommunications devices for deaf persons (TDD's);

- Costs associated with relocating an inaccessible drinking fountain.

Paragraph (f)(1) of the proposed rule provided that when the cost of alterations necessary to make the path of travel serving an altered area fully accessible is disproportionate to the cost of the overall alteration, the path of travel shall be made accessible to the maximum extent feasible. In response to the suggestion of a commenter, the Department has made an editorial change in the final rule (paragraph (g)(1)) to clarify that if the cost of providing a fully accessible path of travel is disproportionate, the path of travel shall be made accessible "to the extent that it can be made accessible without incurring disproportionate costs."

Paragraph (g)(2) (paragraph (f)(2) in the NPRM) establishes that priority should be given to those elements that will provide the greatest access, in the following order: An accessible entrance; an accessible route to the altered area; at least one accessible restroom for each sex or a single unisex restroom; accessible telephones; accessible drinking fountains; and, whenever possible, additional accessible elements such as parking, storage, and alarms. This paragraph is unchanged from the proposed rule.

Paragraph (h) (paragraph (g) in the proposed rule) provides

that the obligation to provide an accessible path of travel may not be evaded by performing a series of small alterations to the area served by a single path of travel if those alterations could have been performed as a single undertaking. If an area containing a primary function has been altered without providing an accessible path of travel to serve that area, and subsequent alterations of that area, or a different area on the same path of travel, are undertaken within three years of the original alteration, the total cost of alterations to primary function areas on that path of travel during the preceding three year period shall be considered in determining whether the cost of making the path of travel serving that area accessible is disproportionate. Only alterations undertaken after January 26, 1992, shall be considered in determining if the cost of providing accessible features is disproportionate to the overall cost of the alterations.

Section 36.406 Standards for New Construction and Alterations

Section 36.406 implements the requirements of sections 306(b) and 306(c) of the Act, which require the Attorney General to promulgate standards for accessible design for buildings and facilities subject to the Act and this part that are consistent with the supplemental minimum guidelines and requirements for accessible design published by the Architectural and Transportation Barriers Compliance Board (ATBCB or Board) pursuant to section 504 of the Act. This section of the rule provides that new construction and alterations subject to this part shall comply with the standards for accessible design published as appendix A to

this part.

Appendix A contains the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) which is being published by the ATBCB as a final rule elsewhere in this issue of the Federal Register. As proposed in this Department's proposed rule, Sec.36.406(a) adopts ADAAG as the accessibility standard applicable under this rule.

Paragraph (b) was not included in the proposed rule. It provides, in chart form, guidance for using ADAAG together with subparts A through D of this part when determining requirements for a particular facility. This chart is intended solely as guidance for the user; it has no effect for purposes of compliance or enforcement. It does not necessarily provide complete or mandatory information.

Proposed Sec.36.406(b) is not included in the final rule. That provision, which would have taken effect only if the final rule had followed the proposed Option Two for Sec.36.401(a), is unnecessary because the Department has chosen Option One, as explained in the preamble for that section.

Section 504(a) of the ADA requires the ATBCB to issue minimum guidelines to supplement the existing Minimum Guidelines and Requirements for Accessible Design (MGRAD) (36 CFR part 1190) for purposes of title III. According to section 504(b) of the Act, the guidelines are to establish additional requirements, consistent with the Act, "to ensure that buildings and facilities are accessible, in terms

of architecture and design, ...and communication, to individuals with disabilities." Section 306(c) of the Act requires that the accessibility standards included in the Department's regulations be consistent with the minimum guidelines, in this case ADAAG.

As explained in the ATBCB's preamble to ADAAG, the substance and form of the guidelines are drawn from several sources. They use as their model the 1984 Uniform Federal Accessibility Standards (UFAS) (41 CFR part 101, subpart 101 -19.6, appendix), which are the standards implementing the Architectural Barriers Act. UFAS is based on the Board's 1982 MGRAD. ADAAG follows the numbering system and format of the private sector American National Standard Institute's ANSI A117.1 standards. (American National Specifications for Making Buildings and Facilities Accessible to and Usable by Physically Handicapped People (ANSI A117 - 1980) and American National Standard for Buildings and Facilities -- Providing Accessibility and Usability for Physically Handicapped People (ANSI A117.1 - 1986).) ADAAG supplements MGRAD. In developing ADAAG, the Board made every effort to be consistent with MGRAD and the current and proposed ANSI Standards, to the extent consistent with the ADA.

ADAAG consists of nine main sections and a separate appendix. Sections 1 through 3 contain general provisions and definitions. Section 4 contains scoping provisions and technical specifications applicable to all covered buildings and facilities. The scoping provisions are listed separately for new construction of sites and exterior facilities; new construction of buildings; additions; alterations; and alterations to historic properties. The technical

specifications generally reprint the text and illustrations of the ANSI A117.1 standard, except where differences are noted by italics. Sections 5 through 9 of the guidelines are special application sections and contain additional requirements for restaurants and cafeterias, medica care facilities, business and mercantile facilities, libraries, and transient lodging. The appendix to the guidelines contains additional information to aid in understanding the technical specifications. The section numbers in the appendix correspond to the sections of the guidelines to which they relate. An asterisk after a section number indicates that additional information appears in the appendix.

ADAAG's provisions are further explained under Summary of ADAAG below.

General Comments

The Department, however, must comply with the requirements of the ADA, the Federal Advisory Committee Act (5 U.S.C app. 1 et seq.) and the Administrative Procedure Act (5 U.S.C 551 et seq.). Neither the Department nor the Board can adopt private requirements wholesale. Furthermore, neither the 1991 ANSI A117 Standard revision nor the BCMC process is complete. Although the ANSI and BCMC provisions are not final, the Board has carefully considered both the draft BCMC scoping provisions and draft ANSI technical standards and included their language in ADAAG wherever consistent with the ADA.

Comments on specific provisions of proposed ADAAG

Summary of ADAAG

This section of the preamble summarizes the structure of ADAAG, and highlights the more important portions.

- Sections 1 Through 3

Sections 1 through 3 contain general requirements, including definitions.

- Section 4.1.1, Application

Section 4 contains scoping requirements. Section 4.1.1, Application, provides that all areas of newly designed or newly constructed buildings and facilities and altered portions of existing buildings and facilities required to be accessible by Sec.4.1.6 must comply with the guidelines unless otherwise provided in Sec.4.1.1 or a special application section. It addresses areas used only by employees as work areas, temporary structures, and general exceptions.

Section 4.1.1(3) preserves the basic principle of the proposed rule: Areas that may be used by employees with disabilities shall be designed and constructed so that an individual with a disability can approach, enter, and exit the area. The language has been clarified to provide that it applies to any area used only as a work area (not just to areas "that may be used by employees with disabilities"), and that the guidelines do not require that any area used as an individual work station be designed with maneuvering space

or equipped to be accessible. The appendix to ADAAG explains that work areas must meet the guidelines' requirements for doors and accessible routes, and recommends, but does not require, that 5% of individual work stations be designed to permit a person using a wheelchair to maneuver within the space.

Further discussion of work areas is found in the preamble concerning proposed Sec.36.401(b).

- Section 4.1.2, Accessible Sites and Exterior Facilities: New Construction

This section addresses exterior features, elements, or spaces such as parking, portable toilets, and exterior signage, in new construction. Interior elements and spaces are covered by Sec.4.1.3.

The final rule retains the UFAS scoping for parking but also requires that at least one of every eight accessible parking spaces be designed with adequate adjacent space to deploy a lift used with a van. These spaces must have a sign indicating that they are van-accessible, but they are not to be reserved exclusively for van users.

- Section 4.1.3, Accessible Buildings: New Construction

This section establishes scoping requirements for new construction of buildings and facilities.

Sections 4.1.3 (1) through (4) cover accessible routes,

protruding objects, ground and floor surfaces, and stairs.

Section 4.1.3(5) generally requires elevators to serve each level in a newly constructed building, with four exceptions included in the subsection. Exception 1 is the "elevator exception" established in Sec.36.401(d), which must be read with this section. Exception 4 allows the use of platform lifts under certain conditions.

- Section 4.1.6, Alterations

An alteration is a change to a building or facility that affects or could affect the usability of or access to the building or facility or any part thereof. There are three general principles for alterations. First, if any existing element or space is altered, the altered element or space must meet new construction requirements (section 4.1.6(1)(b)). Second, if alterations to the elements in a space when considered together amount to an alteration of the space, the entire space must meet new construction requirements (section 4.1.6(1)(c)). Third, if the alteration affects or could affect the usability of or access to an area containing a primary function, the path of travel to the altered area and the restrooms, drinking fountains, and telephones serving the altered area must be made accessible unless it is disproportionate to the overall alterations in terms of cost and scope as determined under criteria established by the Attorney General (Sec.4.1.6(2)).

Section 4.1.6 should be read with Sec..36.402 through 36.405. Requirements concerning alterations to an area serving a primary function are addressed with greater detail

in the latter sections than in section 4.1.6(2). Section 4.1.6(1)(j) deals with technical infeasibility. Section 4.1.6(3) contains special technical provisions for alterations to existing buildings and facilities.

- Sections 5 Through 9

These are special application sections and contain additional requirements for restaurants and cafeterias, medical care facilities, business and mercantile facilities, libraries, and transient lodging. For example, at least 5 percent, but not less than one, of the fixed tables in a restaurant must be accessible.

- Section 9, Accessible Transient Lodging

Section 9 addresses two types of transient lodging: hotels, motels, inns, boarding houses, dormitories, resorts, and other similar places (sections 9.1 through 9.4); and homeless shelters, halfway houses, transient group homes, and other social service establishments (section 9.5). The interplay of the ADA and Fair Housing Act with respect to such facilities is addressed in the preamble discussion of the definition of "place of public accommodation" in Sec.36.104.

Section 10, Transportation Facilities

Section 10 of ADAAG is reserved. On March 20, 1991, the ATBCB published a supplemental notice of proposed rulemaking (56 FR 11874) to establish special access

requirements for transportation facilities. The Department anticipates that when the ATBCB issues final guidelines for transportation facilities, this part will be amended to include those provisions.

Subpart E -- Enforcement

Because the Department of Justice does not have authority to establish procedures for judicial review and enforcement, subpart E generally restates the statutory procedures for enforcement.

Section 36.501 describes the procedures for private suits by individuals and the judicial remedies available. In addition to the language in section 308(a)(1) of the Act, Sec.36.501(a) of this part includes the language from section 204(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a - 3(a)) which is incorporated by reference in the ADA. A commenter noted that the proposed rule did not include the provision in section 204(a) allowing the court to appoint an attorney for the complainant and authorize the commencement of the civil action without the payment of fees, costs, or security. That provision has been included in the final rule.

Section 308(a)(1) of the ADA permits a private suit by an individual who has reasonable grounds for believing that he or she is "about to be" subjected to discrimination in violation of section 303 of the Act (subpart D of this part), which requires that new construction and alterations be readily accessible to and usable by individuals with disabilities. Authorizing suits to prevent construction of facilities with architectural barriers will avoid the necessity

of costly retrofitting that might be required if suits were not permitted until after the facilities were completed. To avoid unnecessary suits, this section requires that the individual bringing the suit have `reasonable grounds" for believing that a violation is about to occur, but does not require the individual to engage in a futile gesture if he or she has notice that a person or organization covered by title III of the Act does not intend to comply with its provisions.

Section 36.501(b) restates the provisions of section 308(a)(2) of the Act, which states that injunctive relief for the failure to remove architectural barriers in existing facilities or the failure to make new construction and alterations accessible "shall include" an order to alter these facilities to make them readily accessible to and usable by persons with disabilities to the extent required by title III. The Report of the Energy and Commerce Committee notes that "an order to make a facility readily accessible to and usable by individuals with disabilities is mandatory" under this standard. H.R. Rep. No. 485, 101st Cong., 2d Sess, pt 4, at 64 (1990). Also, injunctive relief shall include, where appropriate, requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by title III of the Act and this part.

Section 36.502 is based on section 308(b)(1)(A)(i) of the Act, which provides that the Attorney General shall investigate alleged violations of title III and undertake periodic reviews of compliance of covered entities. Although the Act does not establish a comprehensive administrative enforcement mechanism for investigation and resolution of all complaints received, the legislative history

notes that investigation of alleged violations and periodic compliance reviews are essential to effective enforcement of title III, and that the Attorney General is expected to engage in active enforcement and to allocate sufficient resources to carry out this responsibility. Judiciary Report at 67.

Many commenters argued for inclusion of more specific provisions for administrative resolution of disputes arising under the Act and this part in order to promote voluntary compliance and avoid the need for litigation. Administrative resolution is far more efficient and economical than litigation, particularly in the early stages of implementation of complex legislation when the specific requirements of the statute are not widely understood. The Department has added a new paragraph (c) to this section authorizing the Attorney General to initiate a compliance review where he or she has reason to believe there may be a violation of this rule.

Section 36.503 describes the procedures for suits by the Attorney General set out in section 308(b)(1)(B) of the Act. If the Department has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by title III or that any person or group of persons has been denied any of the rights granted by title III and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court. The proposed rule provided for suit by the Attorney General "or his or her designee." The reference to a "designee" has been omitted in the final rule because it is unnecessary. The Attorney General has delegated enforcement authority under the ADA

to the Assistant Attorney General for Civil Rights. 55 FR 40653 (October 4, 1990) (to be codified at 28 CFR 0.50(l).)

Section 36.504 describes the relief that may be granted in a suit by the Attorney General under section 308(b)(2) of the Act. In such an action, the court may grant any equitable relief it considers to be appropriate, including granting temporary, preliminary, or permanent relief, providing an auxiliary aid or service, modification of policy or alternative method, or making facilities readily accessible to and usable by individuals with disabilities, to the extent required by title III. In addition, a court may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved, when requested by the Attorney General.

Furthermore, the court may vindicate the public interest by assessing a civil penalty against the covered entity in an amount not exceeding $50,000 for a first violation and not exceeding $100,000 for any subsequent violation. Section 36.504(b) of the rule adopts the standard of section 308(b)(3) of the Act. This section makes it clear that, in counting the number of previous determinations of violations for determining whether a "first" or "subsequent" violation has occurred, determinations in the same action that the entity has engaged in more than one discriminatory act are to be counted as a single violation. A "second violation" would not accrue to that entity until the Attorney General brought another suit against the entity and the entity was again held in violation. Again, all of the violations found in the second suit would be cumulatively considered as a "subsequent violation."

Section 36.504(c) clarifies that the terms "monetary damages" and "other relief" do not include punitive damages. They do include, however, all forms of compensatory damages, including out-of-pocket expenses and damages for pain and suffering.

Section 36.504(a)(3) is based on section 308(b)(2)(C) of the Act, which provides that, "to vindicate the public interest," a court may assess a civil penalty against the entity that has been found to be in violation of the Act in suits brought by the Attorney General. In addition, Sec.36.504(d), which is taken from section 308(b)(5) of the Act, further provides that, in considering what amount of civil penalty, if any, is appropriate, the court shall give consideration to "any good faith effort or attempt to comply with this part." In evaluating such good faith, the court shall consider "among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability."

The "good faith" standard referred to in this section is not intended to imply a willful or intentional standard --that is, an entity cannot demonstrate good faith simply by showing that it did not willfully, intentionally, or recklessly disregard the law. At the same time, the absence of such a course of conduct would be a factor a court should weigh in determining the existence of good faith.

Section 36.505 states that courts are authorized to award attorneys fees, including litigation expenses and costs, as provided in section 505 of the Act. Litigation expenses include items such as expert witness fees, travel expenses,

etc. The Judiciary Committee Report specifies that such items are included under the rubric of "attorneys fees" and not "costs" so that such expenses will be assessed against a plaintiff only under the standard set forth in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978). (Judiciary report at 73.)

Section 36.506 restates section 513 of the Act, which encourages use of alternative means of dispute resolution. Section 36.507 explains that, as provided in section 506(e) of the Act, a public accommodation or other private entity is not excused from compliance with the requirements of this part because of any failure to receive technical assistance.

Section 36.305 Effective Date

In general, title III is effective 18 months after enactment of the Americans with Disabilities Act, i.e., January 26, 1992. However, there are several exceptions to this general rule contained throughout title III. Section 36.508 sets forth all of these exceptions in one place.

Paragraph (b) contains the rule on civil actions. It states that, except with respect to new construction and alterations, no civil action shall be brought for a violation of this part that occurs before July 26, 1992, against businesses with 25 or fewer employees and gross receipts of $1,000,000 or less; and before January 26, 1993, against businesses with 10 or fewer employees and gross receipts of $500,000 or less. In determining what constitutes gross receipts, it is appropriate to exclude amounts collected for sales taxes.

Paragraph (c) concerns transportation services provided by public accommodations not primarily engaged in the business of transporting people. The 18-month effective date applies to all of the transportation provisions except those requiring newly purchased or leased vehicles to be accessible. Vehicles subject to that requirement must be accessible to and usable by individuals with disabilities if the solicitation for the vehicle is made on or after August 26, 1990.

Subpart F -- Certification of State Labs or Local Building Codes

Subpart F establishes procedures to implement section 308(b)(1)(A)(ii) of the Act, which provides that, on the application of a State or local government, the Attorney General may certify that a State law or local building code or similar ordinance meets or exceeds the minimum accessibility requirements of the Act. In enforcement proceedings, this certification will constitute rebuttable evidence that the law or code meets or exceeds the ADA's requirements.

A definition of "model code" has been added in light of new Sec.36.608.

Many of the comments received from business organizations, as well as those from some individuals and disability rights groups, addressed the relationship of the ADA requirements and their enforcement, to existing State and local codes and code enforcement systems. These commenters urged the Department to use existing

code-making bodies for interpretations of the ADA, and to actively participate in the integration of the ADA into the text of the national model codes that are adopted by State and local enforcement agencies. These issues are discussed in preamble section 36.406 under General comments.

Many commenters urged the Department to evaluate or certify the entire code enforcement system (including any process for hearing appeals from builders of denials by the building code official of requests for variances, waivers, or modifications). Some urged that certification not be allowed in jurisdictions where waivers can be granted, unless there is a clearly identified decision-making process, with written rulings and notice to affected parties of any waiver or modification request. One commenter urged establishment of a dispute resolution mechanism, providing for interpretation (usually through a building official) and an administrative appeals mechanism (generally called Boards of Appeal, Boards of Construction Appeals, or Boards of Review), before certification could be granted.

The Department thoroughly considered these proposals but has declined to provide for certification of processes of enforcement or administration of State and local codes. The statute clearly authorizes the Department to certify the codes themselves for equivalency with the statute; it would be ill-advised for the Department at this point to inquire beyond the face of the code and written interpretations of it. It would be inappropriate to require those jurisdictions that grant waivers or modifications to establish certain procedures before they can apply for certification, or to insist that no deviations can be permitted. In fact, the Department expects that many jurisdictions will allow slight

variations from a particular code, consistent with ADAAG itself. ADAAG includes in Sec.2.2 a statement allowing departures from particular requirements where substantially equivalent or greater access and usability is provided. Several sections specifically allow for alternative methods providing equivalent facilitation and, in some cases, provide examples. (See, e.g., section 4.31.9, Text Telephones; section 7.2(2)(iii), Sales and Service Counters.) Section 4.1.6 includes less stringent requirements that are permitted in alterations, in certain circumstances.

However, in an attempt to ensure that it does not certify a code that in practice has been or will be applied in a manner that defeats its equivalency with the ADA, the Department will require that the submitting official include, with the application for certification, any relevant manuals, guides, or any other interpretive information issued that pertain to the code. (Sec.36.603(c)(1).) The requirement that this information be provided is in addition to the NPRM's requirement that the official provide any pertinent formal opinions of the State Attorney General or the chief legal officer of the jurisdiction.

Section 36.607 addresses the effect of certification. First, certification will only be effective concerning those features or elements that are both (1) covered by the certified code and (2) addressed by the regulations against which they are being certified. For example, if children's facilities are not addressed by the Department's standards, and the building in question is a private elementary school, certification will not be effective for those features of the building to be used by children. And if the Department's regulations addressed equipment but the local code did not, a building's equipment

would not be covered by the certification.

In addition, certification will be effective only for the particular edition of the code that is certified. Amendments will not automatically be considered certified, and a submitting official will need to reapply for certification of the changed or additional provisions.

Certification will not be effective in those situations where a State or local building code official allows a facility to be constructed or altered in a manner that does not follow the technical or scoping provisions of the certified code. Thus, if an official either waives an accessible element or feature or allows a change that does not provide equivalent facilitation, the fact that the Department has certified the code itself will not stand as evidence that the facility has been constructed or altered in accordance with the minimum accessibility requirements of the ADA. The Department's certification of a code is effective only with respect to the standards in the code; it is not to be interpreted to apply to a State or local government's application of the code. The fact that the Department has certified a code with provisions concerning waivers, variances, or equivalent facilitation shall not be interpreted as an endorsement of actions taken pursuant to those provisions.

The final rule includes a new Sec.36.608 concerning model codes. It was drafted in response to concerns raised by numerous commenters, many of which have been discussed under General comments (Sec.36.406). It is intended to assist in alleviating the difficulties posed by attempting to certify possibly tens of thousands of codes. It is included in recognition of the fact that many codes are based on, or

incorporate, model or consensus standards developed by nationally recognized organizations (e.g., the American National Standards Institute (ANSI); Building Officials and Code Administrators (BOCA) International; Council of American Building Officials (CABO) and its Board for the Coordination of Model Codes (BCMC); Southern Building Code Congress International (SBCCI)). While the Department will not certify or "precertify" model codes, as urged by some commenters, it does wish to encourage the continued viability of the consensus and model code process consistent with the purposes of the ADA.

The new section therefore allows an authorized representative of a private entity responsible for developing a model code to apply to the Assistant Attorney General for review of the code. The review process will be informal and will not be subject to the procedures of Sec..36.602 through 36.607. The result of the review will take the form of guidance from the Assistant Attorney General as to whether and in what respects the model code is consistent with the ADA's requirements. The guidance will not be binding on any entity or on the Department; it will assist in evaluations of individual State or local codes and may serve as a basis for establishing priorities for consideration of individual codes. The Department anticipates that this approach will foster further cooperation among various government levels, the private entities developing standards, and individuals with disabilities.

PUBLICATIONS
DEPARTMENT OF JUSTICE

Certification of State and local Building Codes

Code Certification

Title III of the ADA, which covers public accommodations and commercial facilities (most private businesses and non-profit service providers), recognizes the role that building codes may play to ensure compliance with the building-related aspects of accessibility. Title III authorizes the Department of Justice (DOJ) to certify that State laws, local building codes, or similar ordinances meet or exceed the accessibility requirements for new construction and alterations under title III. In ADA litigation, compliance with a certified code constitutes rebuttable evidence of compliance with title III of the ADA. But the significance of certification extends far beyond litigation.

Why is Certification Important?

A major part of the effort to implement the ADA relies on voluntary compliance by businesses. Code certification facilitates voluntary compliance by putting ADA requirements and local requirements into a single, readily available document. It allows builders to rely on their local inspection and approval processes, and it ensures

that accessibility will be routinely considered in those processes. It allows builders to be assured of compliance through inspections early in the construction process, when mistakes can be corrected relatively easily and cost-effectively. It eliminates conflicts between local requirements and ADA requirements. Finally, by incorporating ADA-equivalent accessibility provisions into the local code, certification gives building officials a significant role in enforcing the substance of the ADA. By meshing local processes with Federal requirements, certification makes accessibility part of the process, not an afterthought.

The Certification Process

The title III regulations (28 CFR §§ 36.601 et seq.) provide a detailed description of the process to obtain certification. In general, the process contains the following steps:

- the jurisdiction must provide public notice of the intent to seek certification;
- certification must be discussed at a public hearing, which is on the record;
- copies of the certification request must be available for public inspection and copying;
- the submission to the DOJ must include the code plus supporting documents;
- the DOJ reviews the submission using a side-by-side form which is available on disk;
- the DOJ issues a preliminary determination;
- if the code is equivalent, the DOJ solicits public comments in writing and at public hearings;
- after reviewing the public comments, the DOJ issues a

final determination of equivalency;
- if found not equivalent, then the submitting official has 15 days to oppose determination;

Technical Assistance

Technical assistance and a blank side-by-side comparison form is available from the ADA Information Line .

Status

On March 29, 1995, the DOJ certified that the State of Washington State Regulations for Barrier-Free Facilities was equivalent to the ADA Standards for Accessible Design.

On Sept 23, 1996, the DOJ certified that the Texas Accessibility Standards meet or exceed the requirements of the ADA Standards for Accessible Design.

On December 12, 1997, the Department certified that the Maine Human Rights Act, as implemented by the Maine Accessibility Regulations, meets or exceeds the new construction and alterations requirments of title III of the ADA.

On May 27, 1998, Acting Assistant Attorney General Bill Lann Lee and Governor Lawton Chiles held a joint press conference in Tallahassee, Florida, to announce that the Department of Justice certified the Florida Accessibility Code for Building Construction.

Eight other jurisdictions, including New Mexico, Minnesota, New Jersey, Maryland, California, Indiana, North Carolina, and the County of Hawaii have also submitted codes for certification review. In addition, DOJ

is reviewing several model codes.

Nationwide - In conjunction with the certification of the Florida Code, the Acting Assistant Attorney General wrote to the Governors of the States that have not yet requested ADA certification of their accessibility codes to encourage them to make their State accessibility codes ADA-equivalent and to seek certification. In these letters, Mr. Lee emphasized the benefits of certification - "By meshing local and Federal requirements, certification will increase the number of accessible buildings and decrease the need for costly litigation."

DISTRICT COURT DECISION

U.S. DISTRICT - N.D. OF N.Y.
FILED
MAR 28 2001
AT _____ O'CLOCK _____
Lawrence K. Baerman, Clerk - Syracuse

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN SALVADOR, JR., and
KATHLEEN A. SALVADOR,

Plaintiffs,

- against -

98-CV-1987
(FJS/DRH)

THE LAKE GEORGE pARK COMMISSION, CARL R. DE SANTIS, SR. in his official capacity as Chairman and member of the Lake George Park Commission and in his individual capacity; H. GORDON BURLEIGH, in his official capacity as Vice Chairman and member of the Lake George park Commission and in his individual capacity; MARGARET M. STEWART, in her official capacity as Secretary-Treasurer and member of the Lake George park Commission and in her individual capacity; BRUCE E. YOUNG, in his official capacity as a member of the Lake George park Commission and in his individual capacity; THOMAS L. WOOD, in his

official capacity as a member of the Lake George park Commission and in his individual capacity; JOAN A. ROBERTSON, in her official capacity as a member of the Lake George park Commission and in her individual capacity; E. WILSON CAMPBELL, in his official capacity as a member of the Lake George park Commission and in his individual capacity; JAMES B. NEAL, in his official capacity as a member of the Lake George park Commission and in his individual capacity; ANTHONY P. REALE, in his official capacity as a member of the Lake George park Commission and in his individual capacity; JOHN P. CAHILL, in his official capacity as Commissioner of the Department of Environment Conservation and Ex-officio member of the Lake George park Commission; SANDRA LeBARRON, in her official capacity as official Designee of the Commissioner of the Department Environmental Conservation to the Lake George park Commission, and Department of Environmental Conversation Special Assistant to the Commissioner for the Adirondacks and a member of the Lake George park Commission and in her individual capacity; MICHAEL P. WHITE, in his official capacity as the Executive Director of the Lake George park Commission and in his individual capacity; MOLLY GALLAGHER, in her official capacity as Environmental Analyst of the Lake George park Commission and in her individual capacity; MARTIN AUFFREDOU in his official capacity as Counsel to the Lake George park Commission and in his individual capacity; and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Defendants.

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RICHARD J. BARTLETT, ESQ.

SCULLIN, Chief Judge

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiffs commenced this action in December 1998 alleging numerous causes of action against numerous Defendants. At this point in litigation, the remaining Defendants are the Lake George Park Commission ("Commission"), the New York State Department of Environmental Conservation ("DEC") and fourteen individual Defendants, who are bing sued in their official capacities, due to their membership in either the Commission or the DEC, and in their individual capacities.

Presently before the Court is Defendants' motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.[1]

II. BACKGROUND

Plaintiffs own a marina ta Dunham's Bay, Lake George, Town of Queensbury, Warren County, New York. In 1982, Plaintiffs received a marina permit from DEC. Thereafter in 1987, pursuant to Environmental Conservation Law § 43-0117(4), the New York State Legislature transferred the DEC's regulatory authority over marinas on Lake George to the Commission, empowering that organization to implement regulations governing marinas and recreational activities on the Lake.

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[1] All Defendants, with the exception of Defendant Auffredou, moved together in this matter. Defendant Auffredou moves separately yet his papers mirror those of the other Defendants. The Court, therefore, will include Defendant Auffredou in its definition of Defendants.

Section 43-0117(4) provides, in pertinent part, that: "Following the promulgation of such regulations: (a) no person shall construct any dock, wharf, mooring, marina or put any such structure to use without first obtaining a permit from the commission, ..." New York Envtl. Conserv. Law § 43-0117(4)(McKinney's 1997). That section also provides that the existing DEC regulations would continue in effect until the Commission adopted its own regulations pursuant to § 43-0117(4). The Commission adopte its regulations effective June 3, 1988. The Commission maintains that its adoption of such regulations superseded the DEC's previous regulations.

The procedural and factual histories of this matter are rather complex, and the parties have initiated numerous state court proceedings. At present, it appears that a limited temporary restraining order has been issued, prohibiting Plaintiffs from constructing Handicap accessible facilities at their marina. The state court action, as of the dat the parties filed their motion papers was still pending.

III. DISCUSSION

A. Eleventh Amendment Sovereign Immunity

Plaintiffs seek compensatory and punitive damages against the Commission, the DEC, and each of the individual Defendants in their official capacities. The law is clear, however, that such relief is not available in an action brought by a citizen against a state or its agency. See, e.g., Alden v. Maine, 527 U.S. 706, 709 (1999). Courts have consistently interpreted the Eleventh Amendment as implicitly providing the States with immunity from suits initiated by their own citizens. See Kilcullen v. New York State Dep't of Labor, 205

F.3d 77, 79 (2d Cir. 2000) (citing Seminole Tribe of Florida v. Fla., 517 U.S. 44, 54, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); Hans v. Louisiana, 134 U.S. 1, 16-19, 10 S.Ct. 504, 33 L.Ed.842 (1890)). Moreover, state agencies that act as arms of the state are entitled to the same sovereign immunity as the state. See, e.g., Baker v. Dep't of Envt'l. Conservation of the State of N.Y., 634 F. Supp. 1460, 1462-63 (N.D.N.Y. 1986); see also Komlosi v. New York State Office of Mental Retardation and Developmental Disabilities, 64 F.3d 810, 814-15 (2d Cir. 1995); Atlantic Healthcare Benefits Trust v. Googins, 2 F.3d 1, 4 (2d Cir. 1993) (citing Alabama v. Pugh, 438 U.S. 781, 89 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) (Eleventh Amendment "bars suits against a state agency, . . . , absent a waiver of sovereign immunity").

In this case, it is undisputed that both the Commission and the DEC act as agencies of the state in developing and enforcing environmental laws and, therefore, they are entitled to the same sovereign immunity as the state itself.[2]

Likewise, the protections of the Eleventh Amendment extend to state officials acting in their official capacities. See, e.g., Edelman v. Jordan, 415 U.S. 651, 676-677 (1974); see also Hirsh v. Justices of the Supreme Court of Cal., 67 F.3d 708, 715 (9th Cir. 1995) (sovereign "immunity extends to the individual defendants acting in their official capacities")(citations omitted). When the relief sought, here monetary relief, "would in fact operate against the State, then the action must

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[2] "The DEC [and the Commission] perform[ ] . . . essential governmental function[s] in managing state lands; consequently, in this action, the State itself is the real party in interest." Baker, 634 F. Supp. at 1463 (citations omitted).

be characterized as one brought against the State." Baker, 634 F. Supp at 1463 (citation omitted); see also New York City Health & Hosps. Corp. v. Perales, 50 F.3d 129, 134 (2d Cir 1995) (citation omitted). Since this suit against the individual Defendants, in their official capacities is essentially a suit against the State, the individual Defendants in their official capacities, are entitled to Eleventh Amendment immunity.

Since the Commission, the DEC, and the individual Defendants in their official capacities are clearly entitled to rely upon the defense of sovereign immunity, they may be sued only if they have waived that immunity or if Congress has clearly abrogated that immunity. There is no indication in the record before the Court that Defendants have waived immunity in this matter. In fact, Defendants raised sovereign immunity as an affirmative defense in their answer to Plaintiffs' amended complaint and actively pursued that defense on this motion.

Furthermore, the majority of Plaintiffs' causes of action are seemingly raised pursuant to § 1983. The United States Supreme Court has expressly held that Congress did not intend 42 U.S.C. § 1983 to abrogate the sovereign immunity of states. See Quren v. Jordan, 440 U.S. 332, 341 (1979). Plaintiffs do not specifically challenge this legal assertion with respect to the first through twelfth and fourteenth causes of action. Therefore, Plaintiffs' claims against the Commission, the DEC, and the individual Defendants, in their official capacities, are barred by the Eleventh Amendment's grant of sovereign immunity.

Plaintiffs, however, argue that their amended complaint alleges causes of action that do not provide Defendants with Eleventh Amendment immunity.

Specifically, Plaintiffs allege that their Thirteenth Cause of Action, in part, is brought pursuant to § 12203(a) and (b) of the Americans with Disabilities Act ("ADA"). Plaintiffs maintain that immunity is not available under the ADA and, therefore, the question of whether the regulations imposed are lawful cannot be resolved on a motion to dismiss.

The Court notes that Plaintiffs' Thirteenth Cause of Action, while rather lengthy, fails to allege any cause of action clearly. Although Plaintiffs do make three passing references to the ADA, they fail to specify what particular provisions of that act are applicable.[3] Moreover, the final paragraphs of that cause of action seem to assert issues of res judicata and collateral estoppel regarding and earlier state court order involving the issues raised here and make no mention of the ADA.

The Court questions whether Plaintiff's [*sic.*] thirteenth cause of action is sufficiently pled to meet even the lenient requirements of Rule 8 of the Federal Rules of Civil Procedure. However, assuming *arguendo* that Plaintiffs have properly pled a cause of action under the ADA, the Court still finds that sovereign immunity bars this suit. Recently, the Supreme Court, in Board of Trustees of the Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001), held that suits against a state for monetary damages under Title 1, of the ADA are barred by the Eleventh

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[3] The Court notes that Plaintiffs also refer to Title VII of the Civil Rights Act of 1964, which seemingly has no bearing on this case.

Amendment.[4] See id. at 968. In finding that Title I of the ADA did not meet this requirements [*sic.*], the Court found that the legislative history of the ADA does not demonstrate that Congress was concerned with the states engaging in a pattern of unconstitutional employment discrimination. See id. at 965-66.

While it is unclear from Plaintiffs' amended complaint precisely how they are invoking the ADA, Plaintiffs allege in their memorandum of law that Defendants have violated §§ 12203(a) and (b) of the ADA by interfering with Plaintiffs' attempts to comply with the ADA's requirements.

Plaintiffs do not cite any legal authority for applying this section to a state. In any event, the Court, in light of the Supreme Court's reasoning in Garrett, declines to find that the state may be sued under those provisions of the ADA. There is not indication that Congress, in passing §§ 12203(a) and (b) of the ADA, was concerned with a pattern or practice of states interfering with others' compliance with the mandates of the ADA. Those sections of the ADA, therefore, cannot apply to states for to do so would unlawfully abrogate their sovereign immunity.

In sum, the Court concludes that Eleventh Amendment sovereign immunity bars all of Plaintiffs' claims against the Commission, the DEC, and the individual Defendants in their official capacities. Accordingly, the Court grants Defendants'

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[4] The Court declined to address whether Title II, the public entity provisions of the ADA was a proper abrogation of state sovereign immunity. See Garrett, 121 S.Ct. at 960 n. 1.

motions for judgment on the pleadings and dismisses Plaintiffs' amended complaint, in its entirety, as alleged against those Defendants.

B. Qualified Immunity

Defendants assert that the individual Defendants are entitled to qualified immunity for any actions they took with respect to Plaintiffs. See Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). The doctrine of qualified immunity shields government officials from liability when they are performing their discretionary official functions. See, e.g., Ying Jing Gan v. City of New York, 996 F.2d 522, 531 (2d Cir. 1993). In order to defeat Defendants' qualified immunity defense, Plaintiffs must show that Defendants violated a right that was clearly established at the time the alleged violation occurred. See Anderson v. Creighton, 483 U.S. 635, 640 (1987).

As the Second Circuit has stated "'[a] right is "clearly established" if "[t]he contours of the right [are] sufficiently clear" 'in the context of the alleged violation such' "that a reasonable official would understand that what he is doing violates that right."'" Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 250-51 (2d Cir. 1998) (internal citation omitted)). In other words, "a court must consider 'not what a lawyer would learn or intuit from researching case law, but what a reasonable person [in the government actor's] position should know' about the appropriateness of his conduct under federal law." Id. (quoting Young v. County of Fulton, 160 F.3d 899 (2d Cir. 1998)) (other citations omitted).

In the present case, Plaintiffs maintain that immunity[5] does not protect Defendants since Defendants' consistent, selective enforcement against Plaintiffs requires a finding that Defendants knowingly violated Plaintiffs' rights. Despite this conclusory allegation, Plaintiffs have failed to identify, with the required degree of specificity, the clearly established right that Defendants have violated. See, e.g., Komlosi, 64 F.3d at 816. Moreover, to the extent that this conclusory allegation can be construed as a claim that the individual Defendants were hostile toward them, this argument must fail. The defense of qualified immunity is based on whether an official's acts were objectively reasonable and not on that official's subjective motivation. See Crawford-El v. Britton, 523 U.S. 574, 588-89 (1998). Thus, the motivation of the individual official is irrelevant to the determination of whether he is entitled to qualified immunity for his actions. See Sound Aircraft Servs., Inc., v. Town of E. Hampton, 192 F.3d 329, 334 (2d Cir. 1999); see also Fry v. McCall, No. 95 Civ. 1915, 1998 WL 770563, *9 (S.D.N.Y. Nov. 4, 1998) (finding that a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was improperly motivated)(citation omitted)). Finally, even assuming Plaintiffs had asserted that Defendants' conduct in applying the Commission's regulations to Plaintiffs' marina operation violated a clearly established right, Defendants would, nonetheless, be entitled to qualified immunity because Plaintiffs have failed to demonstrate that a reasonable official in Defendants' position would have Commission's regulations to Plaintiffs' marina operations.

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[5] Plaintiffs merge the concepts of sovereign immunity and qualified immunity in their memorandum of law. Plaintiffs tem this argument as sovereign immunity, but the Court assumes they are referring to qualified immunity`

Accordingly, the Court grants Defendants' motion for judgment on the pleadings and dismisses Plaintiffs' amended complaint against Defendants in their individual capacities.[6]

IV. CONCLUSION

After carefully reviewing the file, the parties' submissions and the relevant law, and for the reasons stated herein, it is hereby

ORDERED that Defendants' motion for judgment on the pleadings is **GRANTED**; and it is further

ORDERED that Defendant Auffredou's motion for judgment on the pleadings is **GRANTED**; and it is further

ORDERED that the Clerk of the Court enter judgment for Defendants and close this case.

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[6] The Court notes that the Second Circuit has applied the qualified immunity defense to actions arising under the Rehabilitation Act, 29 U.S.C. § 794, the precursor to the ADA. See P.C. v. McLaughlin, 913 F.2d 1033, 1042 (2d Cir. 1990). The Court, therefore, concludes that the defense is also available under the ADA. Likewise, the Supreme Court has acknowledged this defense in § 1983 actions. See Johnson, 239 F.3d at 250 (citations omitted).

AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN SALVADOR, JR., and
KATHLEEN A. SALVADOR,

AMENDED

Plaintiffs, COMPLAINT
98-CV-1987

- against - **TRIAL BY JURY**
IS DEMANDED

THE LAKE GEORGE pARK COMMISSION, CARL R. DE SANTIS, SR. in his official capacity as Chairman and member of the Lake George Park Commission and in his individual capacity; H. GORDON BURLEIGH, in his official capacity as Vice Chairman and member of the Lake George park Commission and in his individual capacity; MARGARET M. STEWART, in her official capacity as Secretary-Treasurer and member of the Lake George park Commission and in her individual capacity; BRUCE E. YOUNG, in his official capacity as a member of the Lake George park Commission and in his individual capacity; THOMAS L. WOOD, in his official capacity as a member of the Lake George park Commission and in his individual capacity; JOAN A. ROBERTSON, in her official capacity as a member of the Lake George park Commission and in her individual capacity; E. WILSON CAMPBELL, in his official capacity as a member of the Lake George park Commission and in his individual capacity; JAMES B. NEAL, in his official capacity as a member of

the Lake George park Commission and in his individual capacity; ANTHONY P. REALE, in his official capacity as a member of the Lake George park Commission and in his individual capacity; JOHN P. CAHILL, in his official capacity as Commissioner of the Department of Environment Conservation and Ex-officio member of the Lake George park Commission; SANDRA LeBARRON, in her official capacity as official Designee of the Commissioner of the Department Environmental Conservation to the Lake George park Commission, and Department of Environmental Conversation Special Assistant to the Commissioner for the Adirondacks and a member of the Lake George park Commission and in her individual capacity; MICHAEL P. WHITE, in his official capacity as the Executive Director of the Lake George park Commission and in his individual capacity; MOLLY GALLAGHER, in her official capacity as Environmental Analyst of the Lake George park Commission and in her individual capacity; MARTIN AUFFREDOU in his official capacity as Counsel to the Lake George park Commission and in his individual capacity; and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Defendants.

PARTIES

1. At all times hereinafter mentioned, Plaintiffs, JOHN SALVADOR, JR. and KATHLEEN A. SALVADOR, hereinafter referred to as Plaintiffs, were and are citizens of the United States, State of New York, County of Warren and Town of Queensbury.

2. At all times hereinafter mentioned, Plaintiffs were and are residents of the United States, State of New York,

County of Warren and Town of Queensbury.

3. At all times hereinafter mentioned, Plaintiffs were and are property owners in the United States, State of New York, County of Warren and Town of Queensbury.

4. At all times hereinafter mentioned, Plaintiffs were and are taxpayers in the United States, State of New York, County of Warren and Town of Queensbury.

5. At all times hereinafter referred to Defendant LAKE GEORGE pARK COMMISSION, hereinafter referred to as the "LGpC", was and is a governmental entity created by act of the New York State Legislature by Chapter 454 of the Laws of 1961.

6. At all times hereinafter mentioned, Defendant LGpC was and is a special agency within the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION.

7. At all times hereinafter mentioned, Defendant LGpC was and is a commission having authority only as defined by New York State statute.

8. At all times hereinafter mentioned, Defendant LGpC was and is a part of the Executive Branch of the government of the State of New York by its inclusion within the Department of Environmental Conservation which is an arm of the Executive Branch.

9. Upon information and belief, at all times hereinafter mentioned, Defendant LGpC was and is a governmental entity within the State of New York.

10. Upon information and belief, at all times hereinafter mentioned, pursuant to Section 43-0105 of the New York State Environmental Conservation Law, hereinafter referred to as the "Environmental Conservation Law", the appointment of members to the LGpC was and is made by the Governor of the State of New York.

11. Upon information and belief, at all times hereinafter mentioned, the appointment of members to the LGpC was and is handled through the appointments office of the Governor of the State of New York.

12. Upon information and belief, at all times hereinafter mentioned, the appointment of members of the LGpC were approved by the New York State Senate as provided in Section 43-0105 of the Environmental Conservation Law.

13. According to the provisions of Section 43-0105 of the Environmental Conservation Law, the LGpC is to be composed of the Commissioner of the Department of Environmental Conservation and nine (9) members.

14. Also according to the provisions of Section 43-0105, the appointment of members by the Governor with the advice and consent of the Senate is to include the following, ". . . at least two of whom shall reside in the county of Essex, two in the county of Warren and two in the county of Washington and at least three of whom shall be members of a civic, protective or service association in the Lake George area."

15. Upon information and belief, at all times relevant, Defendant CARL R. DE SANTIS, SR., hereinafter referred to as "De Santis", was and is Chairman of the LGpC.

16. Upon information and belief, at all times hereinafter mentioned, Defendant De Santis now is a resident of the State of New York, County of Warren, Town of Bolton.

17. Upon information and belief, at all times hereinafter mentioned prior to 1998, Defendant De Santis was a resident of the State of New York, County of Warren, Town of Lake George.

18. Upon information and belief, at all times

hereinafter mentioned, Defendant MARGARET M. STEWART, hereinafter referred to as "Stewart" was and is a member of Defendant LGpC.

19. Upon information and belief, at all times hereinafter mentioned relevant to the instant Complaint, Defendant Stewart was and is the Secretary/Treasurer of Defendant LGpC.

20. Upon information and belief, at all times hereinafter mentioned, Defendant Stewart was and is a resident of the State of New York, County of Warren, Town of Queensbury.

21. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint, Defendant H. GORDON BURLEIGH, hereinafter referred to as "Burleigh" was and is a member of the LGpC.

22. Upon information and belief, at all times hereinafter mentioned, Defendant Burleigh was and is the Vice-Chairman of Defendant LGpC.

23. Upon information and belief, following the reorganization of Defendant LGpC Defendant Burleigh served as acting Chairman of Defendant LGpC between the time at which William Hennessy served as Chairman and the time at which the nomination of Defendant De Santis was approved and Defendant De Santis commenced serving as Chairman of Defendant LGpC.

24. Upon information and belief, at all times hereinafter mentioned, Defendant Burleigh was and is a resident of the State of New York, County of Essex, Town of Ticonderoga.

25. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint, Defendant JOAN A. ROBERTSON, hereinafter referred to as "Robertson" was and is a member of

Defendant LGpC.

26. Upon information and belief, at all times hereinafter mentioned, Defendant Robertson was and is a resident of the State of New York, County of Warren, Town of Queensbury.

27. Upon information and belief, at times hereinafter mentioned, Defendant Robertson was and is the wife of the former Chairman of the Warren County Board of Supervisors.

28. Upon information and belief, Defendant Robertson was the wife of the person who served as the Chairman of the Warren County Board of Supervisors at the time at which Chapter 617 of the Laws of 1987 was enacted by the New York State Legislature and approved by the Governor.

29. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint, Defendant Bruce E. Young, hereinafter referred to as "Young" was and is a member of Defendant LGpC.

30. Upon information and belief, at all times hereinafter mentioned, Defendant Young was and is a resident of the State of New York, County of Washington, Town of Dresden.

31. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint, Defendant THOMAS L. WOOD, hereinafter referred to as "Wood" was and is a member of Defendant LGpC.

32. Upon information and belief, at all times hereinafter mentioned, Defendant Wood was and is a resident of the State of New York, County of Washington, Town of Dresden.

33. Upon information and belief, at all times

hereinafter mentioned and relevant to the instant Complaint, Defendant E. WILSON CAMPBELL, hereinafter referred to as "Campbell" was and is a member of Defendant LGpC.

34. Upon information and belief, at all times hereinafter mentioned, Defendant Campbell was and is a resident of the State of New York, County of Warren, Town of Bolton.

35. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint, Defendant JAMES B. NEAL, hereinafter referred to as "Neal" was and is a member of Defendant LGpC.

36. Upon information and belief, at all times hereinafter mentioned, Defendant Neal was and is a resident of the State of New York, County of Warren, Town of Hague.

37. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint, Defendant ANTHONY P. REALE, hereinafter referred to as "Reale" was and is a member of Defendant LGpC.

38. Upon information and belief, at all times hereinafter mentioned, Defendant Reale was and is a resident of the State of New York, County of Essex, Town of Ticonderoga.

39. Upon information and belief, at certain times relevant to the instant complaint, hereinafter mentioned, Defendant JOHN P. CAHILL, hereinafter referred to as the "ENCON Commissioner", was and is the Commissioner of the Department of Environmental Conservation.

40. Upon information and belief, at certain times relevant to the instant complaint, Defendant ENCON Commissioner was and is an ex-officio member of

Defendant LGpC.

41. Upon information and belief, at certain times relevant to the instant complaint, Defendant ENCON Commissioner was entitled to designate a representative to act for him in his ex-officio capacity as an ex-officio member of Defendant LGpC.

42. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint commencing on or after 1994, Defendant SANDRA LeBARRON, hereinafter referred to as "LeBarron", was and is the Designee of Defendant ENCON Commissioner an ex-officio member of Defendant LGpC.

43. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint in and prior to 1994, Thomas Monroe, Region V Director for ENCON was the Designee of Defendant ENCON Commissioner an ex-officio member of Defendant LGpC.

44. Upon information and belief, at all times hereinafter mentioned, Defendant LeBarron was and is an employee of ENCON.

45. Upon information and belief, at all times hereinafter mentioned, Defendant LeBarron was and is an agent of ENCON.

46. Upon information and belief, at all times hereinafter mentioned, Defendant LeBarron was and is DEC Special Assistant to the ENCON Commissioner for the Adirondacks.

47. Upon information and belief, at all times hereinafter mentioned, Defendant LeBarron was and is a resident of the State of New York, County of Essex.

48. Upon information and belief, at all times hereinafter mentioned and relevant to the instant Complaint, Defendant LeBarron work out of the

Warrensburg office of the DEC.

49. Upon information and belief, at all times hereinafter mentioned, except as specified herein, Defendant MICHAEL P. WHITE, hereinafter referred to as "White" was and is the Executive Director of Defendant LGpC.

50. Upon information and belief, Defendant White became Executive Director of Defendant LGpC effective on or about January 1, 1988.

51. Upon information and belief, at certain times specified herein Defendant White was and is the Secretary of Defendant LGpC.

52. Upon information and belief, from the early 1980's until the end of 1987, Defendant White served as Secretary of Defendant LGpC.

53. Upon information and belief, at certain times specified herein Defendant White held the title of Environmental Analyst with the Department of Environmental Conservation.

54. Upon information and belief, at all times hereinafter mentioned, Defendant White was and is a resident of the State of New York, County of Warren.

55. Upon information and belief, at all times hereinafter mentioned, Defendant White was and is an employee of Defendant LGpC.

56. Upon information and belief, at all times hereinafter mentioned, Defendant White was and is an agent of Defendant LGpC.

57. Upon information and belief, at all times hereinafter mentioned, Defendant MOLLY GALLAGHER, hereinafter referred to as "Gallagher" was and is an employee of Defendant LGpC.

58. At all times hereinafter mentioned Defendant

Gallagher was and is the Environmental Analyst of the LGpC.

59. Upon information and belief, at all times hereinafter mentioned, Defendant Gallagher was and is a resident of the State of New York, County of Warren.

60. Upon information and belief, at all times hereinafter mentioned, Defendant Gallagher was and is an employee of Defendant LGpC.

61. Upon information and belief, at all times hereinafter mentioned, Defendant Gallagher was and is an agent of Defendant LGpC.

62. Upon information and belief, at all times hereinafter mentioned, Defendant MARTIN AUFFREDOU, hereinafter referred to as "Auffredou" was and is the Counsel to Defendant LGpC.

63. Upon information and belief, at all times hereinafter mentioned, Defendant Auffredou was and is an independent contractor for Defendant LGpC.

64. Upon information and belief, at all times hereinafter mentioned, Defendant Auffredou was and is a resident of the State of New York, County of Warren.

65. Upon information and belief, Defendant Auffredou was and is licensed to practice law in the State of New York.

66. Upon information and belief, at all times hereinafter mentioned, Defendant Auffredou was and is an agent of Defendant LGpC.

67. Upon information and belief, at all times hereinafter mentioned, Defendant Auffredou was and is a member of the law firm of BARTLETT, PONTIFF, STEWART and RHODES, P.C., hereinafter referred to as "Bartlett-Pontiff".

68. Upon information and belief, at all times hereinafter mentioned, Defendant Auffredou received compensation from Defendant LGpC through his law firm.

69. Upon information and belief, at all times hereinafter mentioned, Defendant Auffredou accepted compensation from Defendant LGpC through his law firm.

70. Upon information and belief, Defendant Auffredou in his capacity as Counsel to Defendant LGpC acted as a governmental official.

71. Upon information and belief, Defendant Auffredou in his capacity as Counsel to Defendant LGpC acted as a state official.

72. Upon information and belief, Defendant Auffredou was placed on notice and were on notice of the infringement of Plaintiffs' rights involved directly in the conduct of Defendants herein.

73. Despite due notice, those actions were continued by Defendants.

74. Under the existing facts and application of existing purported regulations of Defendant LGpC and other entities, as orchestrated by Defendant Auffredou and other LGpC Defendants the current policy of Defendant LGpC as selectively applied by Defendant Auffredou and the individual Defendant member political appointees of Defendant LGpC, disparate treatment of Plaintiffs in the handling of their existing marina permit and the application which Defendant LGpC, its agents, servants and employees forced Plaintiffs to file with Defendant LGpC.

75. Upon information and belief, the application of purported policies to Plaintiffs herein by Defendant LGpC through the legal interpretation of Defendant Auffredou foster driving Plaintiffs as targeted persons from business in the Lake George area as persons with whom they or their

cohorts disagree or who attempt to assert their Constitutional Rights and civil rights as citizens of the United States.

76. Upon information and belief, Defendants Auffredou and other LGpC Defendants acting under color of state law, individually and in concert, deprived Plaintiffs of their Constitutional and civil rights arising from and by virtue of Plaintiffs' Constitutional and civil rights.

77. Upon information and belief, Defendants Auffredou and other LGpC Defendants acting under color of state law, individually and in concert, deprived Plaintiffs of their contractual rights arising from and by virtue of Plaintiffs' contractual agreements.

78. Upon information and belief, the contract rights derive from Plaintiffs' status as citizens and residents within the territorial limits delineated in Section 43-0103 of the New York State Environmental Conservation Law of Defendant LGpC.

79. Upon information and belief, Defendant Auffredou acting in the capacity as a public officer owed all citizens the fiduciary and contractual duty of in accordance with law and regulation in such a manner as to guarantee each and every citizen their basic Constitutional rights.

80. Upon information and belief, by acting purposefully, individually and in concert in violation of the Constitutional rights of Plaintiffs, Defendant Auffredou has violated Plaintiffs' basic contract rights as citizens and has breached his fiduciary duty acting in the capacity as a public officer.

81. Upon information and belief, similarly, all LGpC Defendants, also acting in their capacities as a public officers owed all citizens the fiduciary and contractual duty of in accordance with law and regulation in such a manner as to guarantee each and every citizen their basic Constitutional

rights.

82. Upon information and belief, all LGpC Defendants, by acting purposefully, individually and in concert in violation of the Constitutional rights of Plaintiffs violated Plaintiffs' basic contract rights as citizens and have breached their fiduciary duty acting in the capacity as a public officers.

83. Upon information and belief, all of the above is in direct derogation of State Law, Rules, Regulations and policy and applicable Federal Law.

84. At all times hereinafter mentioned, Defendant the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, hereinafter referred to as "DEC", was and is a Department within the government of the State of New York.

PLAINTIFFS' PROPERTY

85. By deed dated the 28th day of February, 1973, certain real property more commonly described as land situated in the State of New York, County of Warren, Town of Queensbury, was conveyed by Paul Labiszak and Julia Labiszak into Plaintiffs.

86. Said deed was recorded on the 28th day of February, 1973 in the Office of the Warren County Clerk, in Book 564 of Deeds at page 362.

87. The area in which said real property owned by Plaintiffs is more commonly known as "Dunham Bay" in the North Queensbury area of Defendant Town of Queensbury.

88. Since the date upon which Plaintiffs took title to said premises, Plaintiffs have been taxpayers in Defendant Town of Queensbury and said real property has been taxed

by said municipal entity.

89. By deed dated July 25, 1973, and, upon information and belief, thereafter recorded in the Office of the Warren County Clerk, Plaintiffs conveyed a portion of said real property to the Nature Conservancy.

90. The portion of said property conveyed by Plaintiffs to the Nature Conservancy did not include any lands inundated by the flood waters of Lake George or along the shoreline of Lake George as included in the defined wetland area.

91. Plaintiffs' property was a portion of what previously had been designated as Lot Numbered 11 and 12 of the French Mountain Tract.

92. Lots Numbered 11 and 12 of the French Mountain Tract were the subject of a certain Land Patent appearing in the New York State Archives, State Education Department, in Land Patent Book 27 at page 229, dated December 18, 1818.

93. Said portion of the French Mountain Tract also was depicted in survey dated Spring of 1810, done by Order of Simeon DeWitt, George Webster, Surveyor.

94. By Chapter II of the Laws of the State of New York of 1858, the Civil Divisions of the State were re-established.

95. As part of the re-establishment of the Civil Divisions of the State of New York, the boundaries of Defendant Town of Queensbury were reaffirmed.

96. The boundaries of Defendant Town of Queensbury as set in said re-establishment of Civil Divisions are specified, in pertinent part as follows, ". . . and running thence easterly and northerly along the bounds of Caldwell to Lake George; and then along the east shore of Lake George to the bounds of the county."

97. Thereafter, the Legislature of the State of New York in Legislative Document (1945) No. 67, entitled "Lake George, Complete Report of the New York State Joint Legislative Committee on the Lake George Water Conditions", Revised, March 1945, hereinafter referred to as Document No. 67, relates specifically to the area of Dunham Bay, among others.

98. All of said references and boundaries are critical to the rights of Plaintiffs herein, in establishing jurisdictional claims of the various governmental entities involved in the regulation of Plaintiffs' land and its uses.

99. The above mentioned legislative document, Document No. 67 referred to a survey made by Robert Harpur in 1765 of the Lake George area, said map showing an area of Lake George being identified as Long Island as being one island.

100. Document 67 included reference to a Report of the Forest Commission for 1891 wherein a channel having been cut in Long Island creating South Island is explained.

101. Said Document 67 went on to refer specifically to the Jackson Map of 1756 and states in pertinent part relating to Dunham Bay as follows, "Likewise a comparison of the shore line on the mainland with that of Dunham, Harris and Warner Bays on a modern map suggests that some portions that are now under water were dry land in 1756."

102. Plaintiffs have title to land now inundated by the flood waters of Lake George, the history of how the shore line of Lake George is defined and its relation to the various governmental entities involved in regulatory activities relating thereto, therefore, directly impacts Plaintiffs property rights.

103. The failure of any governmental entity to establish a defined high water mark for Lake George, also

relates directly to the continued inter and intra-governmental over-lapping and conflicting jurisdictions which, in part, has resulted in the damages caused to Plaintiffs and infringement upon their property rights.

104. The measurement of the water level, using the level established at Rogers Rock Gage established a base point for reference.

105. According to Document 67, the level of Lake George at the Rogers Rock Gage in 1894 was 1.31, which according to the conclusion reached in Document 67, indicated that the ". . . original level of the lake during the navigation season was generally not higher than 1.31 on Rogers Rock Gage."

106. The New York State Joint Legislative Committee on Lake George Water Conditions determined that ". . . the mean lake level for the summer season, from June 1, to September 15, for the twenty-nine-year period from 1914-1942 was 3.37."

107. By Chapter 805 of the Laws of 1957 of the State of New York, the legislature authorized the Conservation Commissioner of the State of New York make a survey of Lake George and its shoreline and designate thereon the mean low water mark of the lake.

108. Upon information and belief, said surveying project was conducted.

109. In an article title "Shoreline Survey of Lake George", appearing in the New York State Conservationist, for August-September 1959, authored by Albert T. Davis, Forest Surveyor, it was determined that,

> Following the advice of the Attorney General, the elevation of the mean low water was determined on the basis of the daily readings recorded at the Rogers Rock gage

maintained by the U. S. Geological Survey (this gage is located about a mile north of the actual "Rock" on Stones Bay in the hamlet of Baldwin) for the forty-year period ending in May, 1957. It was found to be at the reading 1.81 feet, equivalent to 317.74 feet above sea level.

The New York State Conservationist, "Shoreline Survey of Lake George" at page 17.

110. At the time at which Plaintiffs purchased said property, said property included an operating marina.

111. From the time that Plaintiffs acquired said real property, Plaintiffs continuously have operated a marina at said location.